90-1766

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, and STEVEN HEWLETT,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION .

FEDERAL EXPRESS CORPORATION,
Plaintiff,

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, KEITH BISSELL, FRANK COCHRAN,
AND STEVE HEWLETT,
Defendants.

CIVIL ACTION NO. 3-87-0633

JUDGE HIGGINS

COMPLAINT

JURISDICTION

1. This action is brought pursuant to 28 U.S.C. §2201 (the federal declaratory judgment statute). This Court has jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1337, because this case arises under several federal statutes and Constitutional provisions protecting commerce and trade, to wit: 49 U.S.C. §1305 (a)(1); 49 U.S.C. §1302(b); the Supremacy Clause of the United States Constitution, Article VI, Clause 2; and the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3.

PARTIES

2. The plaintiff, Federal Express Corporation, is a Delaware corporation and has its principal place of business in Memphis, Tennessee. Plaintiff provides a national small package and express transportation service, and is a certificated air carrier

operating under the grant of an all cargo authority issued by the Federal Aviation Authority under the Federal Aviation Act of 1958.

3. The defendant, Tennessee Public Service Commission, is an agency of the State of Tennessee, operating pursuant to T.C.A. §§65-1-1, *et seq*. Among the duties of the Public Service Commission are the regulation and enforcement of its statutory framework, involving certain railroads and public service companies that fall within that framework.

4. The defendants, Keith Bissell, Frank Cochran, and Steve Hewlett, are the Commissioners of the State Public Service Commission and are sued in their official capacities.

NATURE OF THE CASE

5. On or about July 2, 1986, the defendants issued a show cause order directing Federal Express to appear and show cause why it should not immediately cease and desist from providing intrastate transportation service without first obtaining a Certificate of Necessity and Convenience from the defendants pursuant to T.C.A. §65-15-107. (Show Cause Order, Exhibit A).

6. Federal Express responded, asserting that it was lawfully operating its ground transportation under the auspices of the Federal Aviation Act of 1958 which preempts state agencies from regulating the rates, routes, or services of air carriers. (Response of Federal Express Corporation to Show Cause Order, Exhibit B).

7. Hearings before an Administrative Law Judge were held, along with subsequent hearings before the defendants. A brief taking exception to the Administrative Law Judge's findings was submitted to the Commission. (Exhibit C).

8. On June 9, 1987, the defendants issued an order (Exhibit D), requiring, *inter alia:*

A. "That the transportation of property for hire by Federal Express Corporation in Tennessee intrastate commerce wholly by motor vehicle is subject to the jurisdiction of this Commission and that Federal Express Corporation must obtain a Certificate of Convenience and Necessity under T.C.A. §65-15-107 to provide such transportation."

B. "That Federal Express Corporation must file an application for a Certificate of Convenience and Necessity with the Commission within thirty days after the date of this order or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle."

9. Subsequently the defendants ordered that said Certificate of Convenience and Necessity must be filed on or before August 9, 1987. On July 23, 1987, the plaintiff requested the defendants to stay their previous order. (Exhibit E). The defendants have not yet acted upon the plaintiff's request for stay. Subsequently on August 4, 1987, the plaintiffs requested a stay from the Court of Appeals of the State of Tennessee, having previously appealed the Public Service Commission's action to that court. (exhibit F). No action has been forthcoming from the Court of Appeals and plaintiff currently faces a compliance deadline on August 9, 1987.

10. As set forth in Paragraph 2, *supra,* Federal Express is a certificated air carrier, operating under a grant of authority from the Federal Aviation Administration. As a certificated air carrier, its rates, routes and services are specifically exempted from state regulation by the 1978 Airlines Deregulation Act, 49 U.S.C. §1305(a)(1). That section reads:

> Except as provided in Paragraph 2 of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes,

> or services of any air carrier having authority under subchapter 4 of this act to provide air transportation.

This provision is a part of the Airlines Deregulation Act. This Act speaks directly to and supports operations such as Federal Express, by enumerating the following policies and purposes:

> 1. The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (a) the present and future needs of shippers, (b) the commerce of the United States, and (c) the national defense.
>
> 2. The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.
>
> 3. The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.
>
> 49 U.S.C. §1302 (b).

11. Federal Express has, pursuant to its federal authority, established itself as the leader in the small package air express industry in the United States, currently transporting in excess of 700,000 packages per night to 99% of the U.S. population. Approximately 90% of its total nightly packages pass through the Memphis "super hub" — the heart of the Federal Express system. There, approximately 2,500 employees sort packages in the short three hour "sort" window, for delivery by an appointed time the next morning in the destination city.

12. Federal Express provides express pick up and delivery to every area in Tennessee. Packages are gathered regionally in eight primary cities: Bristol, Chattanooga, Greeneville, Jackson, Knoxville, Memphis, Murfeesboro, and Nashville. The packages

gathered in the eastern portion of Tennessee are flown from Memphis to Knoxville. Since January, 1986, the packages from the central and western portions of the state go from Nashville to Memphis for sorting by either truck or aircraft, depending upon the hour of arrival in Nashville.

13. Of the packages which originate in Tennessee, approximately 88% are destined for a location outside of Tennessee. Of the packages which are destined for locations in Tennessee, approximately 89% originate from outside the state. Whether packages travel by plane or truck within the State of Tennessee, the packages are commingled. Indeed, Federal Express cannot definitely state that packages which move between almost all locations within the state are not transported in part by aircraft. The method used to transport a particular package is not determined solely by its destination; the method of transportation is determined by the time of day a package is received, the volume of packages in the Federal Express system, the weather, and other factors. No matter which method of transportation is used, it is clearly a part of Federal Express' overall national route system.

14. Federal Express' rates are unified on a national, and not local, basis. The rates are set by weight and type of service rather than by destination.

15. The defendants have ordered Federal Express to file an application for a Certificate of Convenience and Necessity pursuant to T.C.A. §65-15-107, which requires "any motor carrier" operating as a common carrier between points within a sate to acquire such a certificate.

16. As set forth in Paragraph 9, *supra,* neither the Commission nor the Court of Appeals has acted upon the plaintiff's application for a stay of the Commission's order.

17. The Commission's interpretation, together with the immediate enforcement thereof, begins the state regulation of the plaintiff, pursuant to T.C.A. §65-15-106. This statute provides:

> a. The Public Service Commission is vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state, to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; to regulate and supervise the schedules, service and method of operation of same; to require the filing of annual and other reports and any other data; to require that the accounts and records of such motor carriers be kept and maintained in a manner consistent with good accounting practice; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

Section (b) further provides that the Commission shall designate law enforcement officers who are charged with the duty of policing and enforcing the provisions of the chapter and who may require drivers of said motor carriers to stop for inspection.

18. Any regulation by the defendants of plaintiff's rates, routes or services under T.C.A. §65-15-106 through the current interpretation by the defendants will directly impact plaintiff's rates, routes, and services and will interfere with plaintiff's interstate and intrastate air and ground transportation network nationwide.

CONTENTIONS

19. The plaintiff contends that the required filing of the Application for Certification of Convenience and Necessity and the concomitant beginning of regulation and enforcement by the defendants of any of plaintiff's shipments in this state is in direct contravention of federal statute and Constitutional provisions because:

a. State regulation is expressly preempted under Section 105 of the Federal Aviation Act and the Supremacy Clause of the United State Constitution, 49 U.S.C. §1305(a)(1), and U.S. Constitution, Article VI, Clause 2.

b. Such regulation also unduly burdens interstate commerce and therefore contravenes the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3.

20. Any regulation of Federal Express' intrastate transportation of parcels will directly and adversely affect its national integrated transportation system, in contravention of the Airline Deregulation Act, and the statutes and Constitutional provisions set forth above.

21. The plaintiff asserts that irreparable injury will occur if it is required to submit to regulation by the Public Service Commission by filing an immediate Application for Certification of Convenience and Necessity because:

a. Such filing may moot the issues now on appeal to the Court of Appeals and the plaintiff's federal statutory and Constitutional concerns may never be heard; and

b. Submission to the jurisdiction of the Public Service Commission by filing such a Certificate initiates regulation and constitutes submission to the claimed jurisdiction of the Commission over this activity. Regulation by the Commission will unduly interfere with and harm the integrated transportation system developed by Federal Express under federal authorization.

RELIEF

22. The plaintiff respectfully requests that the following relief be granted:

1. That the Court issue a temporary restraining order and a preliminary injunction preventing the defendants from enforcing the order of June 9, 1987, pending a determination of the issues in this case.

2. That the Court enter a judgment declaring the efforts of the Public Service Commission to bring Federal Express within its jurisdiction and to regulate it as a motor carrier are unconstitutional and void, such regulation being preempted by specific federal statute, violative of the Supremacy Clause of the United States Constitution and unduly burdensome on interstate commerce under the Commerce Clause of the United States Constitution.

3. For such other general relief as may be appropriate.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX B

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
Nashville, Tennessee

June 9, 1987

IN RE: SHOW CAUSE ORDER AGAINST FEDERAL EXPRESS CORPORATION

DOCKET NO. SMC-977

ORDER

This matter is before the Tennessee Public Service Commission upon its own motion. On July 2, 1986 the Commission entered a show cause order against Federal Express Corporation ordering it to appear and show cause why it should not immediately cease and desist from providing intrastate ground transportation service as a common carrier without first obtaining a certificate of convenience and necessity from the Commission pursuant to T.C.A. §65-15-107.

This matter was set for hearing and heard before Mack H. Cherry, Administrative Judge, on July 23 and September 24, 1986 at the Commission Hearing Room in Nashville, Tennessee. On February 24, 1987 the Administrative Judge issued his Initial Order. The Administrative Judge concluded that Federal Express needs a certificate of convenience and necessity from the Commission to provide intrastate service in Tennessee solely by motor vehicle as a common carrier.

By Order dated February 24, 1987, the Commission notified all parties in this proceeding that it intended to review all issues raised in the record of this proceeding before the Administrative Judge. Federal Express filed a brief with the Commission noting its exceptions to the Initial Order. Purolator Courier Corporation and the Commission Staff filed reply briefs to the brief submitted

by Federal Express. The Commission heard oral argument from all the parties on the issues in this case.

The Commission considered this matter at its Commission Conference on May 7, 1987. After consideration of the entire record, including the briefs and arguments of the parties, the Commission concludes that Federal Express must obtain a certificate of convenience and necessity pursuant to T.C.A. §65-15-107 to provide intrastate service in Tennessee solely by motor vehicle as a common carrier. In support of its decision, the Commission makes the following findings of fact and conclusions of law.

FACTS

The facts in this case are not in dispute. Federal Express provides a small package overnight delivery service between virtually all points in the United States. This small package overnight delivery service includes traffic moving *between points in the state of Tennessee*. Federal Express provides service to 100% of Tennessee's population.

Federal Express operates a hub and spoke system. Its central hub for sorting packages is in Memphis, Tennessee. Approximately 90% of all shipments transported by Federal Express move through the central hub in Memphis. The remaining 10% of its shipments move through smaller regional hubs located in Oakland, California and Newark, New Jersey. Federal Express uses both air transportation and ground transportation to transport shipments through its sort facility. More than 90% of its shipments are moved by aircraft at some point between origin and destination.

Federal Express holds a certificate of public convenience and necessity to provide air transportation from the Civil Aeronautics Board (CAB). Under this authority, Federal Express operates a fleet of fifty-three Boeing 727 aircraft and sixteen DC-10

aircraft. In addition, Federal Express utilizes a fleet of feeder aircraft which are operated by local operators for the exclusive use of Federal Express. Federal Express operates a motor vehicle fleet of more than 16,000 vehicles nationwide. Federal Express holds a certificate of convenience and necessity from the Interstate Commerce Commission to provide ground transportation in interstate commerce.

Federal Express provides service between points in Tennessee by using eight host cities.[1/] Packages picked up by motor vehicle from shippers in all areas of Tennessee are first brought to a Federal Express facility in each host city. Packages are then moved from these eight host cities to the Federal Express hub in Memphis. Packages to be delivered to a point in Tennessee are transported from Memphis to the host city nearest the destination city. Packages are then delivered by motor vehicle to their final destination. Shipments between some of these host cities and Memphis are transported by motor vehicle only. Therefore, no part of some Tennessee intrastate moves involves air transportation from origin to destination. For example, shipments between Jackson and Memphis are moved by truck. The majority of shipments between Nashville and Memphis are moved by truck. Only late shipments are moved from Nashville to Memphis by plane.

Federal Express admits that some Tennessee intrastate shipments are transported from origin to destination without using any aircraft. Mr. Doyle Cloud, Vice President of Government and Regulatory Affairs for Federal Express, testified that a shipment tendered for delivery in Nashville early in the day bound for Pulaski would move solely by motor vehicle. The shipment would be picked up from the shipper by a courier in a

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[1/] Bristol, Chattanooga, Greeneville, Jackson, Knoxville, Memphis, Murfeesboro, and Nashville.

motor vehicle in Nashville. The shipment would be transported from Nashville to Memphis by motor vehicle for sorting. After the sort the shipment would return to Nashville by motor vehicle. The shipment would then be delivered either directly from Nashville to Pulaski by a courier in a motor vehicle, or the shipment would be moved from Nashville on to Murfreesboro by motor vehicle then delivered from Murfreesboro to Pulaski by courier in a motor vehicle. Service between many points in central and western Tennessee are served using ground transportation only.

Mr. Cloud indicated that approximately half of Federal Express' average daily Tennessee intrastate shipments move solely by motor vehicle. Federal Express averages 1085 Tennessee intrastate shipments per day. Of the approximate 500 shipments that move within Tennessee per day solely by ground transportation, about 300 (60%) of the shipments are communication items (documents) and the remaining 200 (40%) are hard goods. These shipments within Tennessee moving solely by ground transportation constitute less than 6% of the Tennessee shipment volume and less than .01% of Federal Express' total national volume.

ISSUES

The Tennessee Motor Carrier Act (hereinafter the Act) defines a motor carrier as follows:

> "Motor carrier," when used in this chapter, means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without semitrailers attached, upon any public highway for the transportation of persons or property or both or for providing or furnishing such transportation service, for hire as a common carrier. T.C.A. §65-15-102(c).

Federal Express operates motor vehicles over the public highways of Tennessee for the transportation of property for hire as a common carrier. Therefore, Federal Express is a motor carrier under the Act.

The Act further provides that a motor carrier cannot lawfully operate as a common carrier between points in Tennessee without first obtaining a certificate of convenience and necessity. T.C.A. §65-15-107. The Commission has never issued Federal Express a certificate of convenience and necessity.

Nevertheless, Federal Express asserts that its intrastate operations are lawful. In support of its position, Federal Express makes four arguments:

(1) Federal Express contends that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. §1305, expressly preempts a state from regulating the rates, routes, or services of a certificated air carrier.

(2) Federal Express contends that state regulation of the transportation activities of certificated air carriers is implicitly preempted under the Supremacy Clause because it frustrates an essential purpose of Congress, it interferes in an area requiring national uniformity, and it unreasonably burdens interstate commerce.

(3) Federal Express contends that because the United States Postal Service has absolute authority over the transportation of mail under its constitutional grant, the promulgation of regulations suspending the private express statutes preempts state regulatory authority over intrastate ground transportation by entities, like Federal Express, who operate under the suspension.

(4) Federal Express contends that the intrastate surface transportation of mail by Federal Express under the suspension of the federal postal monopoly constitutes business conducted for the government of the United States and is excepted from state

regulation under section 65-15-105 of the Tennessee Code Annotated.

ISSUE I

Section 105 (a) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305 (a) expressly preempts state economic regulation of air carriers. This section provides:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the state of Alaska.

Federal Express is an air carrier with authority under subchapter IV of Title 49 of the United States Code. Federal Express argues therefore, that the Tennessee Public Service Commission is expressly preempted from regulating its rates, routes, and services. Federal Express' argument assumes that Congress intended for section 105 to preempt the states from regulating all transportation services provided solely by motor vehicle. The Commission concludes that Congress expressed no such intent.

A. *The Plain Language of Section 105 Shows that Congress Only Intended to Preempt the Air Transportation Rates, Routes, and Services of Air Carriers.*

Section 105 must be read in the context of the statute as a whole. *United States v. Morton,* 467 U.S. 822, 828 104 S. Ct. 2769, 2773, 81 L.Ed. 2d 680, 688 (1984). Thus, in interpreting a statute one should not look to a particular word or phrase in isolation, but should consider it in connection with the whole statute and related statutes, and the objects and policy of the law, in order to give it such a construction as will carry into effect the will or intent of Congress. *Kokoszka v. Belford,* 417 U.S. 642, 650, 94 S. Ct. 2431, 2436, 41 L.Ed. 2d 374, 381 (1974).

Therefore, the proper construction of section 105 requires consideration of the whole statute of which it is a part. Section 105 is a part of Subchapter 1 of Chapter 20 of Title 49 of the United States Code. Chapter 20 is entitled "Federal Aviation Program." Nowhere in that chapter is any intent expressed to deal in any way with the regulation of ground transportation.

Moreover, the terms "air carrier" and "air transportation" used in section 105 limit the scope of the preemption. Congress defines an air carrier as "any citizen of the United States who undertakes... to engage in air transportation." 49 U.S.C. §1301(3). Air transportation means "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." *Id.* at §1310(10). Therefore, section 105 preempts state regulation of the rates, routes, and services of Federal Express as an air carrier which by definition encompasses only air transportation. Section 105 says nothing about the rates, routes, or services of Federal Express as a motor carrier, rail carrier, or any other type of transportation carrier.

Federal Express' interpretation of section 105 extended to its logical conclusion produces absurd results. Under Federal Express' interpretation, a motor carrier could circumvent all intrastate

regulation of its motor carrier activities in every state by simply obtaining authority to operate as an air carrier between two specific points. Once the motor carrier obtained the status of an air carrier, the motor carrier would simply argue that all intrastate regulation of its motor carrier activities have been preempted by section 105. A motor carrier would be able to avoid all intrastate regulation in every state by becoming an "air carrier." Clearly, Congress did not intend that section 105 produce this result.

Federal Express argues that courts have consistently preempted any state regulation affecting the rates, routes, or services of air carriers under the express language of section 105. Each case cited by Federal Express, however, shows that the state regulations preempted in these cases attempted to regulate the air transportation services provided by an air carrier. No case has been cited by Federal Express which suggests that section 105 preempts the states from regulating other transportation services provided by an air carrier. On the contrary the language of these cases supports the position that only the regulation of air transportation rates, routes, or services is preempted. In *Hingson v. Pacific S.W. Airlines,* 743 F. 2d 1408 (9th Cir. 1984), a claim against an air carrier under a California statute prohibiting discrimination against the handicapped by common carriers was preempted as relating to services of an air carrier, but a claim for intentional infliction of emotional distress was not preempted. In *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health,* 389 N.W. 2d 507 (Minn. 1986), the Minnesota Supreme Court held that section 105 preempted state regulation of entry into the field of air ambulance service, but did not preempt state regulation of the delivery of medical services such as staffing requirements and standards for maintenance of sanitary conditions by such an air ambulance.

B. *The Legislative History of Section 105 Supports the Position That Only Air Transportation is Within the Scope of the Preemption.*

Nothing in the legislative history of the Airline Deregulation Act of 1978 (hereinafter Airline Deregulation Act) suggests that Congress intended for section 105 to preempt state regulatory commissions from regulating the intrastate motor carrier operations of an air carrier. No mention of motor carriers or of the preemption of transportation by motor vehicles appears in the legislative history. The legislative history deals only with various aspects of air transportation.

The House Report on the Airline Deregulation Act indicates that its purpose was "to amend the Federal Aviation Act of 1958 to improve air service and provide flexibility in air fares." H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 1, *represented in* [1978] *U.S. Code Cong. & Ad. News* 3737. One of the ways Congress sought to achieve this goal was to remove the external constraints of both state and federal government route and rate regulation to allow market forces to determine the variety, quality, and price of an integrated air transportation system.

Prior to the enactment of the Airline Deregulation Act, carriers providing interstate air transportation services to the public were subject to comprehensive economic regulation by the CAB. No one could provide interstate air transportation services without first obtaining a certificate of public convenience and necessity from the CAB. The rates and services provided by certificated air carriers were subject to regulation by the CAB.[2/] Prior to 1978 many state regulatory commission had established economic

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[2/]Under 49 U.S.C. § 1386(b)(1), the CAB had authority to exempt an air carrier or a class of air carriers from economic omic regulation when the CAB found that such regulation was not in the public interest.

regulatory schemes for intrastate airlines similar to the federal economic regulatory scheme for interstate airlines. In addition, these state regulatory commissions regulated the intrastate activities of CAB-certificated or exempt airlines. *See Hughes Air Corp. v. Public Utilities Commission*, 644 F.2d 1'334, 1336 (9th Cir. 1981). The Tennessee Bureau of Aeronautics, which is part of the Tennessee Department of Transportation, is the state agency in Tennessee which regulates intrastate airlines. T.C.A. § 42-2101 *et seq.*

Federal Express argues that because its air and ground services are so inextricably intertwined, Congress intended section 105 to preempt state regulation of the ground services of a carrier providing air transportation services under the authority of the CAB. Congress never expressed such an intent. The House Public Works and Transportation Committee's discussion of Section 105 clearly shows that preemption was aimed at state regulation of air transportation:

> Existing law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State.
>
> H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate the carrier's routes, rates or services. The bill furthers provides that if a carrier was primarily an intrastate carrier on August 1, 1977, and

> subsequently receives authority from CAB, its State authority must be included in its CAB certificate until the CAB modifies the certificate.
>
> The bill also eliminates Federal jurisdiction over certain service which is essentially intrastate in nature. Under existing law, CAB has jurisdiction over air service between two cities in a State if the aircraft passes over places outside the State. H.R. 12611 provides that service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State. This provision does not apply to flights between the Hawaiian Islands which will continue to be regulated by the CAB.

H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 15-16, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 3737, 3751-52.

In enacting the Airline Deregulation Act, Congress only sought to remove regulatory constraints placed upon air transportation carriers by the CAB and by state regulatory commission which regulated the intrastate activities of CAB-certificated and exempt carriers. Congress did not attempt to remove regulatory constraints placed upon air carriers by other federal or state agencies which regulated other modes of transportation provided by air carriers. For example, until 1980 the motor carrier segment of some interstate movements by air carriers which required movement both by aircraft and by motor vehicle from origin to destination was still subject to regulation by the Interstate Commerce Commission (ICC).[3/] The Airline Deregu-

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[3/] Before 1980 the incidental-to-air transportation exemption from ICC regulation was limited to bona fide collection, delivery, or transfer service. In addition, ICC regulations limited the exemption to geographical areas surrounding airports and cities adjacent to those airports. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19, *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 2283, 2301.

lation Act did not exempt the motor carrier segment of such moves by Federal Express or any other air carrier from ICC regulation. The motor carrier segment of such an interstate move did not become exempt from ICC regulation until Congress enacted the Motor Carrier Act of 1980. Moreover, Federal Express currently holds a certificate of convenience and necessity from the ICC. If Congress intended for the Airline Deregulation Act to truly integrate the air and ground services of an air carrier, why does Federal Express need an ICC certificate to engage in the interstate surface transportation of goods? The answer is clear. The Airline Deregulation Act sought to reduce regulatory restraints on air transportation provided by an air carrier and not other regulations governing other types of transportation services.

Likewise, section 105 of the Airline Deregulation Act only preempts state regulatory commissions from regulating the intrastate air rates, routes, and services of air carriers with authority from the CAB. This section does not preempt state regulatory commissions from regulating other modes of transportation in which an air carrier might engage.

C. *The Historic Structure of The Division of Regulatory Responsibility For Ground and Air Transportation Supports a Finding that Congress did not Intend to Affect Ground Transportation in Enacting Section 105.*

Historically, air transportation and ground transportation have been regulated by different federal agencies under different laws. The Civil Aeronautics Board (CAB) regulated the air transportation industry. The Interstate Commerce Commission (ICC) regulates the ground transportation industry. In addition, the regulatory responsibility of air and ground transportation has been divided between federal and state governments.

The Motor Carrier Act of 1980 (hereinafter Motor Carrier Act) specifically and expressly allocates regulatory responsibility for ground transportation by motor vehicle. In the Motor Carrier Act, Congress reserved to the states the power to regulate intrastate transportation provided by a motor carrier with exceptions not material here. 49 U.S.C. § 10521(b)(1). No provision of the Motor Carrier Act purports to preempt the jurisdiction of states to regulate shipments moving wholly by motor vehicle in intrastate commerce. If Congress intended to preempt state regulation of motor carrier operations, the Motor Carrier Act would have been a logical place to express that intention.

In the Motor Carrier Act, Congress exempt from ICC jurisdiction the transportation of property in interstate commerce performed as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier. 49 U.S.C. § 10526(a)(8)(B). In the absence of this exemption language, the interstate ground transportation of air freight would be subject to ICC regulation. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19 (1980), *reprinted in* [1980] *U.S. Code Cong. & Ad. News,* 2283, 2301. In the legislative history of the Motor Carrier Act, Congress stated that it was adopting the exemption from ICC jurisdiction concerning continuous ex-air movements "to bring it into line with what the Congress has done on air cargo movements. Since the transportation of air cargo is now exempt from Federal economic regulation, the Committee believes that it makes sense to exempt the entire movement, including the motor carrier transportation portion." *Id.* Therefore, if Congress had intended to exempt intrastate ground movements by air carriers from regulation, it would have said so. The fact that it did not say so confirms no such intention existed.

Federal preemption of state regulatory power in the field of commerce is not favored in the absence of "persuasive reasons" - either that Congress has unmistakably so ordained or the nature

of the subject matter permits no other conclusion. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 317, 101 S. Ct. 1124, 1120, 67 L.Ed. 2d 258 (1981).

Congress has expressly spoken on the subject of state regulation of intrastate motor carrier operations. In the Interstate Commerce Act, Congress expressly preserves the dual system of motor carrier regulation, reserving to the states the power to regulate intrastate transportation provided by a motor carrier except as otherwise specifically provided therein. 49 U.S.C. § 10521. Under the Interstate Commerce Act, a motor carrier is defined as a "person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 10102(14). In holding itself out to the general public to provide motor vehicle transportation for compensation, Federal Express is clearly a motor common carrier. Nothing in the Interstate Commerce Act preempts state regulation of the intrastate activities of Federal Express when it operates as a motor common carrier. Therefore, Congress, far from expressing a clear and manifest intent to preempt state regulation of Federal Express when it chooses to operate as a motor common carrier wholly in intrastate commerce, has on the contrary evidenced a clear and manifest intent that state regulation should continue.

D. *The Efforts of Federal Express to Have Section 105 Amended to Accomplish What it Here Argues has been Accomplished Undercut its Contentions as to Preemption.*

Mr. Armando Labrada, Vice President and Associate General Counsel for Purolator, testified that Federal Express has initiated a proposal to Congress to preempt state regulation of intrastate surface movements by air carriers by amending section 105. In its trial brief Purolator submitted a recent article from *The Vanderbilt Lawyer* written by Kenneth R. Masterson, Vice

President and General Counsel of Federal Express. In this article Mr. Masterson argues that,

> The logical conclusion is clear: federal preemption of state regulations which purport to economically regulate intrastate surface transportation performed by express package carriers is necessary at this time.

If Federal Express believes that section 105 preempts state regulation of intrastate ground transportation by air carriers, then why is Federal Express seeking to amend section 105 to achieve this same goal? The answer is clear. Section 105 as it currently exists does not preempt such state regulation.

ISSUE 2

Federal Express argues that state regulation of all transportation provided by certificated air carriers should be implied because (i) state regulation allegedly frustrates Congressional purposes, ii) national uniformity is allegedly required, and (iii) state regulation allegedly unreasonably burdens interstate commerce.

"The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission v. F.C.C.*, __U.S.__, 106 S. Ct. 1890, 1899, 90 L. Ed. 2d 369, 382 (1986). The intent of Congress to preempt state regulation can be either express or implied. When Congress expressly states its intent to preempt state regulation, as it did in section 105, one need not look beyond the express preemptive language of the statute to determine whether federal preemption has occurred. *See Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 464 U.S. 7, 12-13, 104 S. Ct. 291, 294, 78 L. Ed. 2d 10, 15 (1983). In *Aloha* the United States Supreme Court noted that rules developed by the Court in cases involving implied preemption have little application in cases where federal preemption is explicit. *Id.* at 12 n.5, 104 S. Ct. at 294 n.5, 78 L. Ed. 2d at 15 n.5.

In this case Federal Express argues that the preemption of state regulation of all transportation of air carriers is implied. To support its argument Federal Express uses rules developed in cases involving implied preemption. The preemption of state regulation under section 105, however, is express not implied. Therefore, the rules developed in cases involving implied preemption used by Federal Express in this case simply do not apply. Congress clearly stated its preemptive intent in the statute. The Commission does not have to look elsewhere to find the preemptive intent of Congress. When one determines that state regulation has not been preempted by a statute expressly providing for such preemption, the preemption inquiry ends. One does not continue to look for an implied intent to preempt from examining the purpose behind the enactment of a particular statute.

Even if one uses the rules developed in cases of implied preemption in this case, no federal preemption of state regulation of the motor carrier operations of Federal Express would be found. Nothing in the language of or legislative history of the Airline Deregulation Act or any other act of Congress indicates that Congress intended to change the policies governing the regulation of motor common carriers as expressed in the Interstate Commerce Act. The Airline Deregulation Act is concerned with air transportation and air carriers not motor carrier transportation and motor common carriers. In the Airline Deregulation Act, Congress did clearly preempt state regulation of the rates, routes, and services of air carriers, but Congress in no way expressed any intent to preempt state regulation of rates, routes, and services of motor common carriers. Therefore, so long as Federal Express chooses to provide air transportation as an air carrier, state regulation of its rates, routes, and services is clearly preempted. In this case, however, Federal Express has chosen to enter an entirely separate field and to conduct operations as a ;motor common carrier. In so doing Federal Express, by its own acts, leaves behind its status as an air carrier and instead becomes

a motor common carrier as that term is defined in both the Interstate Commerce Act and the Tennessee Motor Carrier Act. As a motor common carrier Federal Express is subject to the same regulatory standards as any other motor common carrier. Nowhere has Congress indicated any intent to allow air carriers to become motor common carriers without being subject to the same regulations as other motor common carriers. Therefore, state regulation of transportation performed solely by motor vehicle by Federal Express does not frustrate any Congressional purpose. Indeed, the position taken by Federal Express would frustrate the Congressional purpose provided in the Interstate Commerce Act to continue state regulation of intrastate ground transportation by motor vehicle.

The contentions of Federal Express as to some supposed Congressional policy of national uniformity are likewise based on the same erroneous assumption that operations as a motor common carrier are somehow included in a statute dealing solely with air carriers and air transportation. The Congressional policy as to the operation of motor common carriers is stated in the Interstate Commerce Act and under that Act state regulation of intrastate motor common carrier operations continues.

Likewise, in its arguments based on the commerce clause, Federal Express simply ignores the fact that it is operating as a motor common carrier wholly in Tennessee intrastate commerce in the subject operations, and ignores the law that Congress has left the regulation of such motor common carrier operations to the states. Where Congress has spoken, as it has here, commerce clause arguments have no relevance. *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946).

ISSUE 3

Under the private express statutes, the United States Postal Service (USPS) has a monopoly over the carriage of mail. 18

U.S.C. § 11696, 39 U.S.C. § 601. Congress, however, gave the USPS the power to suspend the operation of the private express statutes when the public interest so requires. 39 U.S.C. § 601(b). The USPS has suspended the operation of the private express statutes when certain conditions are met. 39 C.F.R. §§310, 320. Federal Express states that it transports documents and other items which constitute letters and mail under the suspension provided for in 39 C.F.R. § 320.6 (c). This section suspends the private express statutes for extremely urgent letters and provides,

> a letter is extremely urgent and is covered by the suspension if the amount paid for private carriage of the letter is at least three dollars or twice the applicable U.S. Postage for First Class mail (indicating priority mail) whichever is the greater.

Federal Express contends that carriers operating under the suspension operate under the absolute authority of the USPS to transport letters which preempts state regulatory authority over the transportation of letters in intrastate commerce by motor vehicle.

Federal Express transports hard goods as well as communications products in intrastate commerce by motor vehicle in Tennessee. The transportation of hard goods does not fall within the preemption argument being made by Federal Express concerning the transportation of letters. Therefore, the Commission need not decide this issue to determine whether Federal Express must obtain authority to provide intrastate ground transportation in Tennessee. Nevertheless, the Commission will address this issue.

Federal Express cited several cases to support its position. None of these cases, however, relate to a carrier operating under the USPS's suspension of the private express statutes. In some of the cases cited, the courts have held that local or state regulations interfering with the functioning of the USPS were preempted.

Johnson v. Maryland, 254 U.S. 51, 41 S. Ct. 16, 65 L. Ed. 126 (1920) (federal postal regulations requiring the fitness and competence of post office drivers preempts state driver licensing requirements); *United States v. City of Pittsburgh*, 661 F. 2d 783 (9th Cir. 1981) (local ordinance prohibiting postal carriers from crossing lawns without express consent held unconstitutional under Supremacy Clause); *Stewart v. United States Postal Service*, 508 F. Supp. 112 (N.D. Cal. 1980) (USPS not required to comply with local zoning ordinance where compliance would hamper the functions of the USPS). In the rest of the cases cited, the courts held that persons were in violation of the private express statutes. *Associated Third Class Mail Users v. United States Postal Service*, 600 F. 2d 824 (D.C. Cir. 1979) advertising circulars addressed to particular persons or location were letters under the private express statutes and thus under postal monopoly); *United States Postal Service v. Brennan*, 574 F. 2d 712 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1018, 59 L. Ed. 2d 73 (1979) (same day delivery of letters for compensation by private party violated private express statutes); *United States v. Black*, 569 F. 2d 1111(10th Cir. 1978) (conveyance of letters by private party between two cities between which the USPS had established regular postal routes violated private express statutes).

Federal Express has cited no case which supports its contention that a person operating under the suspension of the private express statutes is clothed with the same absolute authority over the transportation of letters as the USPS so as to preempt state regulation. Federal Express has introduced no evidence which demonstrates that a carrier operating under the suspension is in fact operating within the authority of the USPS. To the contrary, Federal Express is not required to obtain any certificate or permit from the USPS to transport extremely urgent letters pursuant to the suspension under 39 C.F.R. § 320.6. When a carrier wants to begin providing the transportation of extremely urgent letters under this suspension, it simply does so. The USPS does not

exercise any direct control over the transportation service provided by a carrier operating within the bounds of the suspension. The USPS only has the power to revoke the suspension of a carrier when the terms of the suspension in 39 C.F.R. § 320.6 have been violated. The USPS also has the power to conduct an inspection and audit of a carrier operating under the suspension to determine whether the terms of the suspension have been violated. Moreover, the USPS transports extremely urgent letters in competition with Federal Express through its Express Mail service.

Therefore, Federal Express does not stand in the same stead as the USPS with state regulatory authority over the intrastate transportation of letters. Federal Express has no monopoly over the transportation of extremely urgent letters. Any carrier which meets the conditions in 39 C.F.R. § 320.6 may transport extremely urgent letters under the suspension. Requiring Federal Express to obtain a certificate from the Commission will not impede or hamper the functions of the USPS. Other carriers, such as Purolator, transport extremely urgent letters in intrastate commerce under authority issued by this Commission. Because Federal Express is not clothed with the same absolute authority over the transportation of letters as the USPS, the preemption of state regulation of the transportation of letters applicable to the USPS is not applicable to Federal Express.

ISSUE 4

Federal Express has argued that the absolute authority of the USPS over the transportation of letters extends to Federal Express under the suspension of the private express statutes. As such, Federal Express contends that its transportation of letters is conducting business for the government of the United States.

Section 65-15-105 of the Tennessee Code Annotated provides:

> *Interstate commerce and government business excepted.* – Neither this chapter nor any provision thereof, shall be construed to regulate or apply to commerce with foreign nations, or commerce among the several states of the United States or to business conducted for the government of the United States. except insofar as the same may be permitted under the constitution of the United States and the acts of Congress.

Therefore, Federal Express argues that its transportation of letters is excepted from Commission regulation under T.C.A. § 65-15-105. This argument is without merit.

The Commission has previously found that Federal Express does not stand in the same stead in regard to the public and to state regulatory authority as the USPS in the transportation of letters. The transportation of letters by Federal Express cannot be considered the conduct of business for the government of the United States for the reasons previously stated.

The Commission has considered the scope of the government business exception in recent years. In *In Re: Ford L. Wright & Marie A. Wright, d/b/a All American Moving & Storage for Declaratory Ruling*, Docket No. SMC-882 (June 7, 1982), the Commission had to decide whether household goods movers who operated pursuant to contracts with the United States military came within the government business exception in T.C.A. § 65-15-105. The Commission concluded that the transportation provided by the household goods movers did not come within the government business exception. The Commission found that T.C.A. § 65-15-105 was essentially a codification of the doctrine of federal preemption. The Commission found no federal law which was inconsistent with requiring the household goods movers to obtain a contract hauler's permits. Therefore, the Commission concluded that the transportation provided by the household goods movers was "permitted under the Constitution of the United States and the Acts of Congress."

The Commission has previously concluded that federal law does not preempt the states from regulating the transportation of letters by carriers operating under the suspension of the private express statutes. Therefore, the transportation of extremely urgent letters by Federal Express is permitted under the Constitution and the acts of Congress and is not excepted from regulation by the Commission under T.C.A. §65-15-105.

CONCLUSION

Federal Express admits that it transports documents and packages for hire between points in Tennessee solely by motor vehicle. Under T.C.A. § 65-15-102(c), this activity makes Federal Express a motor carrier. Therefore, under T.C.A. § 65-15-107, Federal Express must obtain a certificate of convenience and necessity to transport this property for hire between points in Tennessee by motor vehicle.

Federal Express argues that the Commission's regulation of its intrastate ground transportation has been preempted by section 105 of the Airline Deregulation Act of 1978. Neither the plain language of section 105 nor its legislative history supports this conclusion. The historical division of regulatory responsibility for air transportation and ground transportation does not support a finding of preemption. Federal Express is seeking to have Congress amend section 105 to do what Federal Express purports section 105 already does: preempt the states from regulating intrastate shipments by an air carrier moved wholly by motor vehicle. Therefore, the Commission concludes that section 105 does not preempt this Commission from regulating the intrastate shipments of Federal Express moved wholly by motor vehicle.

Federal Express argues that the preemption of this Commission's regulation of its transportation provided solely by motor vehicle in intrastate commerce is implied. The Commis-

sion finds that an implied preemption analysis is not appropriate in this case. Congress expressly stated its intent to preempt state regulation in section 105. Therefore, no implied preemption analysis is necessary to determine Congress' intent. Even under an implied preemption analysis, no preemption would be found. Nothing in the language of or the legislative history of the Airline Deregulation Act or any other act of Congress indicates that Congress intended for air carriers engaged in transportation wholly by motor vehicle within a state to be exempt from state regulation.

Federal Express contends that it transports extremely urgent letters in intrastate commerce under a suspension of the private express statutes. Federal Express argues that by operating under the suspension it operates under the absolute authority of the USPS which preempts state regulatory authority over the transportation of letters. Federal Express cites no case law to directly support this proportion. The USPS has little control over the transportation provided by Federal Express or other carriers under the suspension. Therefore, the Commission concludes that the preemption of state regulation of the transportation of letters by the USPS does not extend to the transportation of extremely urgent letters by carriers like Federal Express operating under the suspension.

Finally, Federal Express contends that because it transports letters pursuant to the absolute authority of the USPS, Federal Express is conducting business for the United States which is excepted from Commission regulation under T.C.A. § 65-15-105. This section however, simply codifies the doctrine of federal preemption. The Commission has previously concluded that it has not been preempted from regulating the intrastate shipments of Federal Express by motor vehicle. Therefore, T.C.A. § 65-15-105 does not except these shipments from Commission regulation.

Federal Express has failed to carry its burden of proving that it is not subject to Commission regulation and that it should not be required to obtain a certificate of convenience and necessity before providing intrastate service in Tennessee as a common carrier by motor vehicle. Therefore, Federal Express must obtain a certificate of convenience and necessity pursuant to T.CA. § 65-15-107 to provide intrastate service within Tennessee wholly by motor vehicle.

The Commission recognizes that Federal Express has many existing Tennessee customers which currently use Federal Express to make Tennessee intrastate shipments. Rather than disrupt these existing operations by immediately issuing a cease and desist order, the Commission hereby directs Federal Express to file an application for a certificate of convenience and necessity within thirty (30) days of the date of this Order. The Commission will not attempt to interfere with Federal Express' Tennessee intrastate service provided solely by motor vehicle pending a decision on Federal Express' application, provided such application is filed within thirty (30) days of the date of this Order and provided Federal Express expeditiously prosecutes its application.

IT IS THEREFORE ORDERED:

1. That the transportation of property for hire by Federal Express Corporation in Tennessee intrastate commerce wholly by motor vehicle is subject to the jurisdiction of this Commission and that Federal Express Corporation must obtain a certificate of convenience and necessity under T.C.A. § 65-15-107 to provide such transportation.

2. That Federal Express Corporation must file an application for a certificate of convenience and necessity with the Commission within thirty (30) days of the date of this Order or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle.

3. That any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

4. That any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

/s/ Frank D. Cochran
CHAIRMAN

/s/ Keith Bissell
COMMISSIONER

/s/ Steven Hewlett
COMMISSIONER

ATTEST
/s/ Illegible
EXECUTIVE DIRECTOR

SUPPLEMENTAL APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

No. _____

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Respondents.

ORDER

The application of Federal Express Corporation for a stay of a final order entered by the Public Service Commission on June 9, 1987, was heard by the undersigned on August 6, 1987.

Upon consideration of said application, memorandum in support thereof, exhibits thereto, responses of the Public Service Commission and Purolator Courier Corporation, and argument of counsel, it has been determined that said application should be denied, but on condition that compliance with said order of the Public Service commission will not prejudice the prosecution of the present proceeding for review of said order.

It is therefore ordered that said application for stay be denied on condition that the compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order.

ENTER AUG 6, 1987

/s/ HENRY F. TODD
PRESIDING JUDGE
/s/ BEN H. CANTRELL, JUDGE

SUPPLEMENTAL APPENDIX D

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff,

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendants.

JUDGE WISEMAN

MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

Defendants, Tennessee Public Service Commission, Frank Cochran, Keith Bissell, and Steven Hewlett, hereby move the Court pursuant to Rule 65 (a) (2) to consolidate the trial on the merits in this case with the preliminary injunction hearing scheduled for 9:00 a.m. on August 20, 1987. As grounds for this motion , defendants assert that because no factual dispute exists in this case and the issues are issues of statutory construction which the parties have briefed and argued several times before the Commission, the Court should consolidate the trial on the merits with the preliminary injunction hearing set in this case.

A memorandum in support of this motion is submitted with this motion.

Respectfully submitted,

Donald L. Scholes
Deputy General Counsel
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3191

Attorney for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this ___ day of August, 1987.

/s/ Donald L. Scholes
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff

VS.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Defendants

JUDGE WISEMAN

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

Defendants, Tennessee Public Service Commission, Frank Cochran, Keith Bissell, and Steven Hewlett, hereby move the court pursuant to Rule 65 (a)(2) to consolidate the trial on the merits in this case with the preliminary injunction hearing scheduled for 9:00 a.m. on August 20, 1987.

Under Rule 65(a)(2) of the Federal Rules of Civil Procedure, the Court may order the trial of an action on the merits to be consolidated with a preliminary injunction hearing. The Advisory Committee Note on Rule 65 states that:

> The authority [to consolidate] can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application [for preliminary injunction] will be relevant to the merits.

Therefore, the consolidation of a trial on the merits with a preliminary injunction hearing is encouraged with the evidence

to be offered in the preliminary injunction hearing and the trial on the merits are substantially the same.

The consolidation of a trial on the merits with a preliminary injunction hearing minimizes the potential adverse effect of what may prove to be an unjustified restraint on the defendant and shortens the time plaintiff may be threatened by irreparable harm. 11 Wright & Miller, *Federal Practice and Procedure*, § 2950 at 484 (1973). Consolidation may obviate the need to decide whether a preliminary injunction is necessary since a decision on the merits may be reached before irreparable harm is sustained by a plaintiff. *Id.* at 485.

If a motion to consolidate should ever be granted under Rule 65(a)(2) in a case, the present case is that case. The facts in the present case are not in dispute. The only issues before the court are issues of statutory construction. Therefore, the Court will consider the same issues in the preliminary injunction hearing which it would consider in a trial on the merits. By consolidating the Court can avoid having the same arguments presented at both the preliminary injunction hearing and a trial on the merits and can avoid an unnecessary delay in a decision on the merits. When no material issue of fact is in dispute, a court should grant a motion to consolidate a trial on the merits with a preliminary injunction hearing. *Saunders v. Washington Metropolitan Area Trans. Auth.*, 359 F. Supp. 457 (D.D.C. 1973).

By consolidating the Court may well obviate the need for a preliminary injunction in this case. The Commission has extended the time for Federal Express to file its application for a certificate of convenience and necessity to August 25, 1987. If the Court makes a decision on the merits in this case before August 25, 1987, no preliminary injunction will be necessary. If no decision is made by August 25, 1987, the Court can still shorten the time Federal Express may be threatened by alleged irreparable harm and minimize restraint on the Commission's power to regulate

intrastate transportation by motor vehicle by consolidating the trial on the merits in this case with the preliminary injunction hearing.

A consolidation will not prejudice the right of Federal Express to present its case and be heard on the merits. No factual dispute exists. Federal Express' case, like the Commission's, consists of legal arguments on the statutes in question. Federal Express has presented its legal arguments in this case on several occasions. Federal Express presented its legal arguments in a written response to the Commission's show cause order entered July 2, 1986, in the administrative hearing, in post-hearing briefs before the Commission, in oral argument before the Commission, and before Judge Higgins in a hearing on a temporary restraining order. Federal Express should have no problem presenting its case on the merits at the preliminary injunction hearing scheduled for August 20, 1987.

For these reasons, the Court should grant this motion to consolidate the trail on the merits in this case with the preliminary injunction hearing.

Respectfully submitted,

/s/ Donald L. Scholes
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
615/741-3191

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this 18th day of August, 1987.

/s/ Donald L. Scholes

SUPPLEMENTAL APPENDIX E

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendants

JUDGE WISEMAN

ANSWER OF THE TENNESSEE PUBLIC SERVICE COMMISSION ET AL.

Come now the Defendants Tennessee Public Service Commission (hereinafter Commission) *et al.* by an through their attorney and for answer to Plaintiff's complaint would show this Court as follows:

I.

In response to the numbered allegations in the complaint the Defendants respond paragraph by paragraph as follows:

1. Defendants admit the allegations of Paragraph 1.

2. Defendants admit that plaintiff Federal Express Corporation's principal place of business is in Memphis, Tennessee but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2.

3. Defendants admit the allegations of Paragraph 3.

4. Defendants admit the allegations of Paragraph 4.

5. Defendants admit the allegations of Paragraph 5.

6. Defendants admit the allegations of Paragraph 6 except to deny that plaintiff is lawfully operating its intrastate ground transportation in Tennessee under the auspices of the Federal Aviation Act of 1958.

7. Defendants admit the allegations of Paragraph 7.

8. Defendants admit the allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraph 9 except to deny that the Tennessee Court of Appeals has not acted upon plaintiff's request for a stay and to deny that plaintiff currently faces a compliance deadline on August 9, 1987. Defendants aver that the Tennessee Court of Appeals denied plaintiff's request for a stay on August 6, 1987 (Exhibit A) and the defendants have entered an order extending the time for plaintiff to file an application for a certificate of convenience and necessity until August 25, 1987 (Exhibit B).

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 10. Defendants admit the remaining allegation in Paragraph 10 except to deny that intrastate transportation in Tennessee provided by plaintiff wholly by motor vehicle is exempted from state regulation by the Airline Deregulation Act of 1978.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13.

14. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14.

15. Defendants admit the allegations of Paragraph 15.

16. Defendants admit that the Commission never acted upon plaintiff's request for a stay of the Commission's Final Order. Defendants deny that the Tennessee Court of Appeals has not acted upon plaintiff's request for a stay of the commission's Final Order. Defendants aver that the Tennessee Court of Appeals denied plaintiff's request for a stay on August 6, 1987 (Exhibit A).

17. Defendants admit that the Commission has the authority to supervise and regulate every motor carrier in Tennessee pursuant to T.C.A. § 65-15-106 and that the Commission designates law enforcement officers to police and enforce the provisions of Chapter 15 of Title 65 of the Tennessee Code Annotated. Defendants deny that its Final Order begins the immediate enforcement of all state regulation. Defendants aver that the Commission's Final Order only requires plaintiff to file an application for a certificate of convenience and necessity or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle. While plaintiff's application is pending, the Commission will not attempt to interfere with plaintiff's intrastate service in Tennessee provided wholly by motor vehicle.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18.

19. Defendants deny the allegations of Paragraph 19.

20. Defendants deny that Commission regulation of intrastate transportation provided by plaintiff wholly by motor vehicle is in contravention of the Airline Deregulation Act of 1978 and the United States Constitution. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 20.

21. Defendants deny the allegations of Paragraph 21.

II.

Defendants aver that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, does not preempt the Commission from regulating Tennessee intrastate transportation provided by plaintiff wholly by motor vehicle. Therefore, because plaintiff provides a for-hire transportation service within Tennessee by motor vehicle, plaintiff is subject to the Commission's regulation of motor carriers under Chapter 15 of Title 65 of the Tennessee Code Annotated.

III.

All allegations in the complaint not heretofore specifically admitted or denied are hereby generally denied and denied as though separately and specifically denied.

And now having fully answered, the defendants pray that no preliminary injunction be issued preventing the Commission from enforcing its Final Order of June 9, 1987 and that this case be dismissed with costs adjudged against the plaintiff.

Respectfully submitted,

/s/ Donald L. Scholes
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
615/741-3191

Attorney for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Answer has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this ____ day of August, 1987.

/s/ Donald L. Scholes
Attorney for Defendants

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

No. _____

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Respondents.

ORDER

The application of Federal Express Corporation for a stay of a final order entered by the Public Service Commission on June 9, 1987, was heard by the undersigned on August 6, 1987.

Upon consideration of said application, memorandum in support thereof, exhibits thereto, responses of the Public service Commission and Purolator Courier Corporation, and argument of counsel, it has been determined that said application should be denied, but on condition that compliance with said order of the Public Service commission will not prejudice the prosecution of the present proceeding for review of said order.

It is therefore ordered that said application for stay be denied on condition that the compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order.

ENTER _____

/s/ HENRY F. TODD
PRESIDING JUDGE

/s/ BEN H. CANTRELL, JUDGE

Exhibit A

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

Nashville, Tennessee

August 10, 1987

IN RE: SHOW CAUSE ORDER AGAINST FEDERAL EXPRESS CORPORATION

DOCKET NO. SMC-977

ORDER

In its Final Order in this matter dated June 9, 1987, the Commission concluded that Tennessee intrastate transportation provides wholly by motor vehicle by Federal Express Corporation was subject to Commission regulation. Therefore, the Commission ordered Federal Express to either file an application for a certificate of convenience and necessity within thirty (30) days of the date of the Final Order or else cease and desist from providing intrastate service within Tennessee wholly by motor vehicle. By Order dated July 14, 1987, the Commission extended the time for filing an application to August 9, 1987 (Because August 9, 1987 is a Sunday, Federal Express has until Monday, August 10, 1987, to file an application under the terms of our Order).

On August 4, 1987, Federal Express filed an Application for Immediate Stay with the Tennessee Court of Appeals, Middle Section, requesting that the court stay the requirement that Federal Express file an application pending a determination of the substantial Constitutional and statutory issues raised in the petition for review. On August 6, 1987, the Court of Appeals entered an Order denying the Application for Immediate Stay. On August 7, 1987, Federal Express filed a complaint in the United State District Court for the Middle District of Tennessee against the Commission seeking a declaratory judgment that the

Commission has been preempted from regulating intrastate transportation provided by Federal Express wholly by motor vehicle. At the same time Federal Express filed a Motion for Temporary Restraining Order seeking to restrain the Commission from requiring it to file an application for a certificate of convenience and necessity as required in the Final Order. A hearing on the temporary restraining order was held at 1:30 on Friday, August 7, 1987. At the conclusion of the hearing, the court took the Motion for Temporary Restraining Order under advisement.

Because the Motion for Temporary Restraining Order has not yet been acted upon, the Commission finds that Federal Express should be given an additional fifteen (15) days to complete and file its application. Therefore, the time for Federal Express to file an application for a certificate of convenience and necessity is hereby extended until August 25, 1987.

It is so ordered.

/s/ Frank D. Cochran
CHAIRMAN

/s/ Keith Bissell
COMMISSIONER

/s/ Steven Hewlett
COMMISSIONER

ATTEST
/s/ Illegible
EXECUTIVE DIRECTOR

Exhibit B

SUPPLEMENTAL APPENDIX F

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendants

JUDGE WISEMAN

TRIAL BRIEF OF DEFENDANTS

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August 18, 1987

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ISSUES

1. Whether section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, preempts the Commission from regulating Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle.

2. Whether Commission regulation of Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle unduly burdens interstate commerce.

STATEMENT OF THE CASE AND FACTS

Federal Express Corporation filed this complaint and requested a preliminary injunction against the defendants (hereinafter referred to collectively as the Commission) because of a Final Order entered by the Commission on June 9, 1987. In this Final Order the Commission concluded the Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle was subject to Commission regulation. Therefore, the Commission ordered Federal Express to either file an application for a certificate of convenience and necessity within thirty days of the date of the Final Order or else cease and desist from providing Tennessee intrastate service wholly by motor vehicle. In an Order entered on July 14, 1987, the Commission extended the time for Federal Express to file its application until August 9, 1987.

The Commission entered this Final Order in a show cause proceeding initiated by the Commission. On July 2, 1986, the Commission entered a show cause order against Federal Express ordering it to appear and show cause why it should not immediately cease and desist from providing intrastate ground transportation service in Tennessee as a common carrier without first obtaining a certificate of convenience and necessity from the Commission pursuant to T.C.A. § 65-15-107.

At the administrative hearing in this case, Federal Express admitted that it provides a for-hire transportation service between points in Tennessee wholly by motor vehicle. Therefore, the Commission concluded that under T.C.A. §65-12-102(c), Federal Express is a motor carrier. Thus, intrastate moves made by Federal Express wholly by motor vehicle are subject to the Commission's jurisdiction. Under T.C.A. § 65-12-107, a motor carrier must obtain a certificate of convenience and necessity from the Commission before providing a for-hire transportation service by motor vehicle within Tennessee. Because the Commission had never issued Federal Express a certificate of convenience and necessity, the Commission ordered Federal Express to either file an application for a certificate or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle. The Commission stated in its Final Order that it would not interfere with Federal Express' existing intrastate service provided wholly by motor vehicle as long as an application for a certificate was filed within thirty days of the date of the Final Order and expeditiously prosecuted.

Federal Express asserted before the Commission that federal law had preempted the Commission's regulation of its intrastate transportation provided wholly by motor vehicle. Federal Express asserted that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, preempted Commission regulation. This section provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation." 49 U.S.C. § 1305(a)(1). The Commission concluded that Congress only intended for section 105 to preempt the states from regulating air transportation services provided by air carriers. The Commission concluded that section 105 does not preempt the states from regulating other transportation services which an air carrier may seek to provide. Therefore, the

Commission concluded that intrastate transportation provided by Federal Express wholly by motor vehicle was subject to Commission regulation.

On July 9, 1987, Federal Express filed a petition for review with the Tennessee Court of Appeals, Middle Section, seeking judicial review of the Commission's Final Order. On August 4, 1987, Federal Express filed an Application for Immediate Stay with the Tennessee Court of Appeals asking the court to stay the Commission's Final Order until a final determination on the petition for review. The Tennessee Court of Appeals conducted a hearing on the Application for Immediate Stay and denied the application on August 6, 1987. The next day Federal Express filed this complaint against the Commission seeking a declaratory judgment that the Commission has been preempted from regulating Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle. Federal Express also filed a Motion for a Temporary Restraining Order seeking to restrain the Commission from requiring Federal Express to file an application for a certificate of convenience and necessity by August 9, 1987, as required by the Final Order. A hearing on the temporary restraining order was held at 1:30 p.m. on August 7, 1987, before the Honorable Thomas A. Higgins. At the conclusion of the hearing, the court took the Motion for Temporary Restraining Order under advisement. Before Judge Higgins acted upon the Motion for Temporary Restraining Order, the Commission entered an Order on August 10, 1987, giving Federal Express an additional fifteen days to complete and file its application for a certificate. On August 10, 1987, Judge Higgins entered an Order granting Federal Express a temporary restraining order and setting a time and date for a preliminary injunction hearing.

ARGUMENT

Under the Tennessee Motor Carrier Act (hereinafter the Act), the Commission has the statutory duty to supervise and regulate the transportation of persons and property by motor vehicle over the highways of Tennessee to promote and conserve the interest and convenience of the public. T.C.A. § 65-15-101. Under T.C.A. § 65-15-102 (c), a motor carrier is defined to include any person or entity "operating any motor vehicle with or without semitrailers attached, upon any public highway for the transportation of persons or property or both or for providing or furnishing such transportation service, for hire as a common carrier."

In the administrative hearing before the Commission, Federal Express admitted that it provides for-hire Tennessee intrastate transportation wholly by motor vehicle over the highways of Tennessee as a common carrier. Appendix, Volume 1, at 22-23 (a certified copy of the transcript of the administrative hearing before the Commission is attached as an appendix to this brief). Therefore, Federal Express is a motor carrier under the Act and is subject to Commission regulation under the Act. The Act further provides that a motor carrier cannot lawfully operate as a common carrier between points in Tennessee without first obtaining a certificate of convenience of necessity. T.C.A. § 65-15-107. The Commission has never issued Federal Express a certificate of convenience and necessity.

Federal Express asserts that its Tennessee intrastate transportation provided wholly by motor vehicle is not subject to Commission regulation because: (1) the Airline Deregulation Act of 1978 preempts Commission regulation; and (2) Commission regulation unduly burdens interstate commerce. The facts in this case are not in dispute. The issues before the court are issues of statutory construction.

1. *In enacting the Airline Deregulation Act of 1978, Congress did not intend to preempt the Commission's regulation of intrastate transportation provided by Federal Express wholly by Motor vehicle.*

Section 105 (a) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305 (a) preempts state economic regulation of air carriers.

This section provides:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.
>
> (2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection, shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

Federal Express argues that Congress intended for section 105 to preempt the states from regulating all types of transportation services provided by an air carrier, including transportation provided wholly by motor vehicle. The Commission asserts that Congress expressed no such intent. The plain language of section 105, the legislative history of the Airline Deregulation Act of 1978, the historic division of regulatory responsibility for ground and air transportation, and the efforts of Federal Express to have section 105 amended support the Commission's position.

A. *The plain language of section 105 shows that congress only intended to preempt the air transportation rates, routes, and services of air carriers.*

To understand the scope of federal preemption under section 105, this section must be read in the context of the statute as a whole. *United States v. Morton,* 467 U.S. 822, 828, 104 S.Ct. 2769, 2773, 81 L.Ed. 2d 680, 688 (1984). In interpreting a statute one should not look to a particular word or phrase in isolation, but should consider it in connection with the whole statute and related statutes, and the objects and policy of the law, in order to give it such a construction as will carry into effect the will or intent of Congress. *Kokoszka v. Belford,* 417 U.S. 642, 650, 94 S. Ct. 2431, 2436, 41 L.Ed. 2d 374, 381 (1974).

Therefore, the proper construction of section 105 requires consideration of the whole statute of which it is a part. Section 105 is a part of Subchapter 1 of Chapter 20 of Title 49 of the United States Code. Chapter 20 is entitled "Federal Aviation Program." Nowhere in that chapter is any intent expressed to deal in any way with the regulation of ground transportation.

More importantly, the terms "air carrier" and "air transportation" used in section 105 limit the scope of the preemption. Congress defines an air carrier as "any citizen of the United States who undertakes . . . to engage in air transportation." 49 U.S.C. § 1301(3). Air transportation means "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." *Id.* at § 1310(10). *Therefore, section 105 preempts state regulation of the rates, routes, and services of Federal Express as an air carrier, which by definition encompasses only air transportation.* Section 105 says nothing about the rates, routes, or services of Federal Express as a motor carrier, rail carrier, or any other type of transportation carrier.

Section 105 is not a blanket preemption of all state laws for the benefit of air carriers so as to enable them to operate as they

please in whatever areas they please free from state regulation. Federal Express' interpretation of section 105 extended to its logical conclusion produces results which Congress did not intend. Under Federal Express' interpretation, a motor carrier could circumvent all intrastate regulation of its motor carrier activities in every state by simply obtaining authority to operate as an air carrier between two specific points. Once the motor carrier obtained the status of an air carrier, the motor carrier would simply argue that all intrastate regulation of its motor carrier activities have been preempted by section 105. A motor carrier would be able to avoid all intrastate regulation in every state by becoming an "air carrier." Clearly, Congress did not intend that section 105 produce this result. In fact, Congress specifically reserved to the states the power to regulate intrastate transportation provided by a motor carrier. 49 U.S.C. §105211(b)(1).

No case law supports Federal Express' interpretation of section 105. On the contrary the language of the cases supports the position that only the regulation of air transportation rates, routes, or services preempted. In *Hingson v. Pacific S.W. Airlines,* 743 F. 2d 1408 (9th Cir. 1984), a claim against an air carrier under a California statute prohibiting discrimination against the handicapped by common carriers was preempted as relating to services of an air carrier, but a claim for intentional infliction of emotional distress was not preempted. In *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health,* 389 N.W. 2d 507 (Minn. 1986), the Minnesota Supreme Court held that section 105 preempted state regulation of entry into the field of air ambulance service, but did not preempt state regulation of the delivery of medical servcies such as staffing requirements and standards for maintenance of sanitary conditions by such an air ambulance.

Federal Express argued before the Commission that the holding of the United States Supreme Court in *Interstate Commerce Commission v. Texas,* ___U.S. ___, 107 S.Ct. 787, 93 L.Ed. 2d

809 (1987), supported its position on the preemption issue. In that case the Texas Railroad Commission attempted to assert jurisdiction over the motor carrier segment of intrastate trailer-on-flatcar and container-on-flatcar intermodal service, commonly known as piggyback service. In piggyback service a rail carrier moves traffic partly by rail and partly by motor vehicle. The Court held that the Texas Railroad Commission did not have jurisdiction over the motor carrier segment of intrastate piggyback service because the motor carrier segment of the move was performed by a rail carrier not subject to the jurisdiction of the Texas Railroad Commission. *In the present case the Commission is not asserting jurisdiction over the motor carrier segment of movements by Federal Express which have a prior or subsequent movement b y air. The Commission is asserting jurisdiction over the intrastate transportation provided by Federal Express wholly by motor vehicle.* Therefore, the *Texas* case is clearly distinguishable from the present case.

B. *The Legislative History of Section 105 Supports the Position that Only Air Transportation is Within the Scope of the Preemption*

Nothing in the legislative history of the Airline Deregulation Act of 1978 (hereinafter Airline Deregulation Act) suggests that Congress intended for section 105 to preempt state regulatory commissions from regulating the intrastate motor carrier operations of an air carrier. No mention of motor carriers or of the preemption of transportation by motor vehicles appears in the legislative history. The legislative history deals only with various aspects of air transportation.

The House Report on the Airline Deregulation Act indicates that its purpose was "to amend the Federal Aviation Act of 1958 to improve air service and provide flexibility in air fares." H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 1, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 3737. One of the ways Congress

sought to achieve this goal was to remove the external constraints of both state and federal government route and rate regulation over air transportation to allow market forces to determine the variety, quality, and price of an integrated air transportation system.

Prior to the enactment of the Airline Deregulation Act, carriers providing interstate air transportation services to the public were subject to comprehensive economic regulation by the Civil Aeronautics Board (CAB). No one could provide interstate air transportation services without first obtaining a certificate of public convenience and necessity from the CAB. The rates and services provided by certificated air carriers were subject to regulation by the CAB. [1/] Prior to 1978 many state regulatory commissions had established economic regulatory schemes for intrastate airlines similar to the federal economic regulatory scheme for interstate airlines. In addition, these state regulatory commissions regulated the intrastate activities of CAB-certificated or exempt airlines. *See Hughes Air Corp. v. Public Utilities Commission,* 644 F.2d 1334, 1336 (9th Cir. 1981). The Tennessee Bureau of Aeronautics, which is a part of the Tennessee Department of Transportation, is the state agency in Tennessee which regulates intrastate airlines. T.C.A. § 42-2-101 *et seq.*

In enacting the Airline Deregulation Act, Congress only sought to remove regulatory constraints placed upon air transportation carriers by the CAB and by state regulatory commissions which regulated the intrastate activities of CAB-certificated and exempt carriers. The House Public Works and Transportation Committee's discussion of Section 105 clearly shows that preemption was aimed at state regulation of air transportation:

[1/] Under 49 U.S.C. § 1386(b)(1), the CAB had authority to exempt an air carrier or a class of air carriers from economic regulation when the CAB found that such regulation was not in the public interest.

> Existing law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fare are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State.
>
> H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services. The bill further provides that if a carrier was primarily an intrastate carrier on August 1, 1977, and subsequently receives authority from CAB, its State authority must be included in its CAB certificate until the CAB modifies the certificate.
>
> The bill also eliminates Federal jurisdiction over certain service which is essentially intrastate in nature. Under existing law, CAB has jurisdiction over air service between two cities in a State if the aircraft passes over places outside the State. H.R. 12611 provides that service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State. This provision does not apply to flights between the Hawaiian Islands which will continue to be regulated by the CAB.

H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 15-16, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 3737, 3751-52.

In enacting section 105 Congress did not attempt to remove regulatory constraints placed upon air carriers by other federal or state agencies which regulated other modes of transportation

provided by air carriers. Before 1980 the motor carrier segment of some interstate movements by air carriers which required movement both by aircraft and by motor vehicle from origin to destination was still subject to regulation by the Interstate Commerce Commission (ICC). [2/] The Airline Deregulation Act did not exempt the motor carrier segment of such moves by Federal Express or any other air carrier from ICC regulation. The motor carrier segment of such an interstate move did not become exempt from ICC regulation until Congress enacted the Motor Carrier Act of 1980. *See* 49 U.S.C. § 10526(a)(8)(B). Moreover, Federal Express currently holds a certificate of convenience and necessity from the ICC. If Congress intended for the Airline Deregulation Act to truly integrate the air and ground services of an air carrier, why does Federal Express need an ICC certificate to engage in the interstate surface transportation of goods? The answer is clear. The Airline Deregulation Act sought to reduce regulatory restraints on air transportation provided by an air carrier and not other regulations governing other types of transportation services.

Likewise, section 105 of the Airline Deregulation Act only preempts state regulatory commissions from regulating the intrastate air rates, routes, and services of air carriers with authority from the CAB. This section does not preempt state regulatory commissions from regulating other modes of transportation in which an air carrier might engage. Therefore, the Tennessee Bureau of Aeronautics has been preempted from regulating the air transportation rates, routes, and services of air

---

[2/] Before 1980 the incidental-to-air transportation exemption from ICC regulation was limited to bona fide collection, delivery, or transfer service. In addition, ICC regulations limited the exemption to geographical areas surrounding airports and cities adjacent to those airports. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19, *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 2283, 2301.

carriers. The Commission, however, has not been preempted from regulating intrastate transportation provided by air carriers wholly by motor vehicle.

C. *The Historic Structure of The Division of Regulatory Responsibility For Ground and Air Transportation Supports a Finding that Congress did not Intend to Affect Ground Transportation in Enacting Section 105.*

Historically, air transportation and ground transportation have been regulated by different federal agencies under different statutes. The Civil Aeronautics Board (CAB) regulated the air transportation industry. The Interstate Commerce Commission (ICC) regulates the ground transportation industry. In addition, the regulatory responsibility of air and ground transportation has been divided between federal and state governments.

The Motor Carrier Act of 1980 (hereinafter Motor Carrier Act) specifically and expressly allocates regulatory responsibility for ground transportation by motor vehicle. In the Motor Carrier Act, Congress reserved to the states the power to regulate intrastate transportation provided by a motor carrier with exceptions not material here. 49 U.S.C. § 10521(b)(1). No provision of the Motor Carrier Act purports to preempt the jurisdiction of states to regulate shipments moving wholly by motor vehicle in intrastate commerce. If Congress intended to preempt state regulation of motor carrier operations by air carriers, the Motor Carrier Act would have been the logical place to express that intention.

In the Motor Carrier Act, Congress exempted from ICC jurisdiction the transportation of property in interstate commerce performed as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier. 49 U.S.C. §10526(a)(8)(B). In the absence of this exemption language, the interstate ground

transportation of air freight would still be subject to ICC regulation. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19 (1980), *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 2283, 2301. In the legislative history of the Motor Carrier Act, Congress stated that it was adopting the exemption from ICC jurisdiction concerning continuous ex-air movements "to bring it into line with what the Congress has done on air cargo movements. Since the transportation of air cargo is now exempt from Federal economic regulation, the Committee believes that it makes sense to exempt the entire movement, including the motor carrier transportation portion." *Id.* Therefore, if Congress had intended to exempt intrastate ground movements by air carriers from regulation, it would have said so. The fact that it did not say so confirms no such intention existed.

Federal preemption of state regulatory power in the field of commerce is not favored in the absence of "persuasive reasons" - either that Congress has unmistakably so ordained or the nature of the subject matter permits no other conclusion. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 317, 101 S. Ct. 1124, 1130, 67 L.Ed. 2d 258 (1981).

Congress has expressly spoken on the subject of state regulation of intrastate motor carrier operations. In the Interstate Commerce Act, Congress expressly preserves the dual system of motor carrier regulation, reserving to the states the power to regulate intrastate transportation provided by a motor carrier except as otherwise specifically provided therein. 49 U.S.C. § 10521. Under the Interstate Commerce Act, a motor carrier is defined as a "person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 10102(14). In holding itself out to the general public to provide motor vehicle transportation for compensation, Federal Express is clearly a motor common carrier. Nothing in the Interstate Commerce Act preempts state regulation of the intrastate activities of Federal Express when it

operates as a motor common carrier. Therefore, Congress, far from expressing a clear and manifest intent to preempt state regulation of Federal Express when it chooses to operate as a motor common carrier wholly in intrastate commerce, has on the contrary evidenced a clear and manifest intent that state regulation should continue.

D. *The efforts of Federal Express to have section 105 amended to accomplish what it here argues has already been accomplished undercut its contentions as to preemption.*

Mr. Armando Labrada, Vice President and Associate General Counsel for Purolator, testified that Federal Express has initiated a proposal to Congress to preempt state regulation of intrastate surface movements by air carriers by amending section 105. Appendix, Volume 2, at 40.

If Federal Express believes that section 105 preempts state regulation of intrastate ground transportation by air carriers, then why is Federal Express seeking to amend section 105 to achieve this same goal? The answer is clear. Section 105 as it currently exists does not preempt such state regulation.

2. *Commission regulation of Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle doe not unduly burden interstate commerce under the Commerce Clause.*

In arguing that Commission regulation unduly burdens interstate commerce, Federal Express simply ignores the fact that it is operating as a motor common carrier wholly in Tennessee intrastate commerce in the subject operations and ignores the law that Congress has left the regulation of such motor common carrier operations to the states. Where Congress has spoken, as it has here, commerce clause arguments have no relevance. *Prudential Insurance Co. v. Benjamin,* 328 u.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

Nothing in the language of or legislative history of the Airline Deregulation Act or any other act of Congress indicates that Congress intended to change the policies governing the regulation of motor common carriers as expressed in the Interstate Commerce Act. The Airline Deregulation Act is concerned with air transportation and air carriers not motor carrier transportation and motor common carriers. In the Airline Deregulation Act, Congress did clearly preempt state regulation of the rates, routes, and services of air carriers, but Congress in no way expressed any intent to preempt state regulation of rates, routes, and services of motor common carriers. Therefore, so long as Federal Express chooses to provide air transportation as an air carrier, state regulation of its rates, routes, and services is clearly preempted. In this case, however, Federal Express has chosen to enter an entirely separate field and to conduct operations as a motor common carrier. In so doing Federal Express, by its own acts, leaves behind its status as an air carrier and instead becomes a motor common carrier as that term is defined in both the Interstate Commerce Act and the Tennessee Motor Carrier Act. As a motor common carrier, Federal Express is subject to the same regulatory standards as any other motor common carrier. Nowhere has Congress indicated any intent to allow air carriers to become motor common carriers without being subject to the same regulations as other motor common carriers. Policy statements in the Airline Deregulation Act concerning air transportation under the regulatory system adopted by Congress for air transportation do not control the regulation of ground transportation by motor vehicle which is controlled by a separate and district federal stature, the Interstate Commerce Act.

Because Congress has left the regulation of intrastate motor common carrier operations to the states, Commission regulation of intrastate transportation provided by Federal Express wholly by motor vehicle does not unduly burden interstate commerce.

CONCLUSION

Based on the foregoing arguments, defendants urge the court to find that Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle is subject to Commission regulation and to dismiss this case.

Respectfully submitted,

/s/ Donald L. Scholes
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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief and Appendix has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this ___ day of August, 1987.

/s/ Donald L. Scholes
Attorney for Defendants

SUPPLEMENTAL APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff,

vs.

TENNESSEE PUBLIC SERVICE
COMMISSION, *et al.*
Defendants.

Judge Wiseman

SUPPLEMENT TO TRIAL BRIEF OF DEFENDANTS

At the status conference on August 20, 1987, the Court set this matter for trial on the merits on September 10, 1987, and with the consent of the parties extended the temporary restraining order granted by Judge Higgins to that date. At the status conference the court *sua sponte* raised the issue of abstention.[1] Referring to the *Pullman* decision,[2] the Court suggested that this matter might be a proper case for exercise of its discretionary power of abstention and noted that continuation of this appeal could result in conflicting federal and state rulings. In response to the Court's statements, this supplemental brief discusses the application of the abstention doctrine to this case and concludes that abstention is appropriate in the circumstances here.

---

[1] See *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25 (1959).

[2] *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941).

ARGUMENT

Federal Express comes to this Court while its appeal of the Commission's decision lies pending in the state Court of Appeals. The Company unsuccessfully sought a stay of the agency's decision both from the Commission and the Court of Appeals. It now bites the apple a third time.

When a party seeks either declaratory or injunctive relief against a state administrative agency in federal court, a federal court should abstain from exercising its powers to restrain the enforcement of an administrative order when the state has a unified system for review of its administrative orders and when federal intervention would have a disruptive effect on the state's efforts to establish a coherent policy on a matter of substantial public concern. 17 Wright & Miller, *Federal Practice and Procedure* § 4244 at 485 (1978). That is precisely the situation presented by this case.

The United States Supreme Court applied the abstension doctrine in a case similar to the present case in *Alabama Public Service Commission v. Southern Railway Co.,* 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1950). In that case the railroad filed an application with the Alabama Public Service Commission for permission to discontinue intrastate rail passsenger service between two points in Alabama. Under Alabama law the railroad could not discontinue intrastate rail passenger service until the Commission determined that the public interest no longer required the service proposed to be discontinued. The Commission conducted a hearing on the proposed discontinuance and refused to permit the discontinuance. Instead of appealing to the state courts, the railroad filed a complaint and sought injunctive relief in federal district court against the Commission. The railroad alleged that continued operation of the service proposed to be discontinued amounted to a confiscation of its property in violation of the due process clause of the Fourteenth Amendment.

The federal district court enjoined the Commission from enforcing its order denying the discontinuance. The United States Supreme Court reversed the district court on the ground that the district court should have abstained from enjoining the Commission.

In reversing the district court the Court stated that "[f]ew public interest have a higher claim upon the discretion of federal chancellor than the avoidance of needless friction with state policies." *Id.* at 350, 71 S.Ct. at 768, 95 L.Ed. at 1009 (citations omitted). The Court found that abstention was appropriate for two primary reasons. First, the determination of whether the public interest required the continuation of the service proposed to be discontinued involved a state regulatory scheme which required the consideration of local factors. *Id.* at 348, 71 S.Ct. at 767, 95 L.Ed. at 1008. Second, because Alabama state law provided for a review by a specific court of Commission decisions, the Court concluded that the appeal of a Commission order was an integral part of the regulatory process under state law. Therefore, the Court held that federal court intervention was not necessary.

The Sixth Circuit has upheld an abstention on similar facts to the present case in *Ada-Cascade Watch Co., Inc. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897 (6th Circuit 1983). Plaintiffs there sought to have a United States District Court overturn a grant of a solid-waste disposal permit to the defendants. Defendants had followed state regulatory requirements and qualified for the permit. Plaintiffs contended, in federal court, that the state agency had erred and that a federal statute had been violated by the construction of the facility. Defendants moved for summary judgment, prevailed, and the Court of Appeals affirmed. *Id.* at 898.

The Sixth Circuit based its affirmance on *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1089, 87 L.Ed. 1424 (1942). As in *Alabama Public Service Commission*, the two factors

justifying abstention in *Burford* were: (1) the presence of a complex state regulatory scheme which would be disrupted by federal court review; and (2) the existence of a state-created forum with specialized competence in the particular area. *Id.* at 332-34, 63 S.Ct. at 1106-07, 87 L.Ed. at 1434-35.

The facts warranting abstention in *Alabama Public Service Commission* and *Burford* are also present in this case. The Tennessee Commission has the statutory duty to supervise and regulate the transportation of persons and property by motor vehicle over the highways of Tennessee to promote and conserve the interest and convenience of the public. T.C.A. § 65-15-101. Its statutory duty includes the certification of motor carriers providing for-hire transportation within Tennessee. The Commission's ability to regulate transportation in Tennessee with consistency would be seriously impaired if this Court were to intervene in this type of case, thereby creating overlapping and, quite possibly, inconsistent, avenues of appeal. If motor carriers can forestall Commission regulation by simply obtaining an injunction in federal district court against Commission orders by asserting a federal right, the carefully regulated state transportation system in Tennessee would be disrupted. Constant friction between the federal courts and state policies established by the Commission would result.

Tennessee law provides for a unified scheme of judicial review of Commission orders. Unlike the review of orders of most state agencies, final decisions of the Commission are appealed directly to the Tennessee Court of Appeals, Middle Section, pursuant to T.C.A. § 4-5-322 (b) (1). Parties may also appeal, by permission, to the Tennessee Supreme Court. Review by the state courts insures the uniform application of specialized competence. There is a strong state interest in "centralizing judicial review," thereby avoiding forum shopping and other practices that are wasteful of judicial resources. 720 F.2d at 905. In short, the facts of this case present a classic situation appro-

priate for abstention on the grounds enunciated in *Burford* and in *Ada-Cascade Watch Co.* Federal is simply asking this Court to "second-guess a state agency" in the exercise of its assigned duties. See 720 F.2d at 905.

Finally, the case for abstention here is even stronger that in *Ada- Cascade Watch Co.*. In that case, the state proceedings had ended. Here, the state proceedings are in full swing. The Court has even less justification for interference at this time.

This is a state administrative issue which should be solved, in the first instance, by those most familiar with the governing state law. Especially when a state has provided an adequate forum for the protection of the rights of the complaining party (as the Tennessee legislature has done here by providing a right of judicial review by the Tennessee Court of Appeals), a federal court should decline to exercise its jurisdiction. *See Muskegon Theatres v. City of Muskegon,* 507 F.2d 199, 205 (6th Cir. 1974).

CONCLUSION

This court may avoid an unnecessary trial and ruling which may conflict with a state court decision by invoking the doctrine of abstention. Judgement in favor of the defendant will quickly and expeditiously achieve this end. Federal Express will not be harmed by an order granting judgement on the basis of abstention, since it has a pending appeal in the Tennessee Court of Appeals, where its rights can be fully adjudicated. The Court should decline to interfere with the proper state resolution of this appeal issue.

Respectfully submitted,

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Attorney for Defendants

SUPPLEMENTAL APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL CASE NO. 03:87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Defendants.

September 10, 1987, et seq.
Nashville, Tennessee

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE
THOMAS A. WISEMAN, JR.

APPEARANCES:

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MS. HARRISON: For the record, Your Honor, Mr. Cloud is referring to an exhibit that's been marked —pre-marked No. 4, which is a map of the United States.

BY MS. HARRISON:

Q Mr. Cloud, using this exhibit No. 4, can you use this to help you illustrate the line haul operation of Federal Express?

A Again, the system devised by Mr. Smith and Federal Express is one conceived to allow in the movement of express shipments a very efficient operation. That efficiency comes again from the consolidation of shipments from any major point through the Memphis hub, serving all points in the United States.

It's also extremely efficient by restricting the sort traditionally, restricting the sort to one location so that mistakes are not made. When you give us your package, you can expect that package to be delivered.

In order to handle the shipments which now move literally between every address in the United States, we have put together the system which is depicted on the chart where some 56 — it's now some 75 flights of large aircrafts move to and from the Memphis Airport each evening.

There are also some flights during the day, the following day, which transport what we call the PZ traffic, which is a second-day product.

But this map does illustrate the daily movement of packages generated throughout the United States through the Memphis hub.

I might also add that there are many occasions where packages moving between points very closely located, between two points very closely located, would actually move to the Memphis hub and back for delivery.

But everything — historically, everything moves through the Memphis hub. We now have minor hubs located in Newark, New Jersey; Oakland, California; have recently purchased the hub which had previously been used by the air operators who were performing service for Purolator Corporation in Indianapolis. And we have now a system that includes a number — three or four hubs, depending upon what year we're looking at. But we are no longer a single-hub operation as we were traditionally.

Q As I understand it, 90 percent of your traffic moves to Memphis and back out; is that right?

A That's correct. Today, approximately 90 percent of all the shipments handled by Federal Express throughout the United States, and as a matter of fact, throughout the world, do in fact move through the Memphis hub.

Q And in the evening. Late in the evening, 11:00 or 12:00, all the planes in the outlying areas converge on Memphis?

A The Federal Express system, as designed, it really — can be, I think, seen rather clearly as a collapsing system.

The aircraft in the perimeters of the United State depart early: and the system begins to be smaller and smaller, as all of the aircraft head toward Memphis, again, very precisely scheduled so that the hub can accommodate traffic as it arrives in Memphis, Tennessee.

Interestingly, I think, we also operate what we call flying spare aircraft that originates at the extremities of the U.S., excess capacity is built into those aircraft and they literally fly over the system as the system collapses so that in case we have a problem with an aircraft, let's say for instance in Kansas City, Missouri, these four spares are designed to be able to simply drop into Kansas City, pick up the traffic that would otherwise have been left in Kansas City due to an aircraft problem, and move the traffic to Memphis.

It's literally a system that collapses in Memphis and becomes a very small system about 2:00 in the morning when 90 percent of the packages are in the hub and expands outward again during the early morning hours, transporting those packages outbound to 99 percent of the population of the U.S.

Q Those flying spares can also and have also flown into Nashville, weather conditions calling upon them to do so and then flying in parts from Nashville to Memphis.

A As a matter of fact, in areas where trucking takes place, particularly in very adverse weather conditions such as ice, we find that aircraft are much more reliable means of transportation than truck.

So there are occasions, have been occasions where 727 aircraft are flown into Nashville to actually take the traffic from Nashville to Memphis that would have otherwise been moved in Memphis by truck.

That occurs throughout the system. This system changes dramatically from night to night. As aircraft problems arise during the evening, we have a system that allows our controller, operational — the individuals involved in operations to divert any aircraft in the United States that has excess capacity in order to relieve a particular problem which might have arisen during the evening with an aircraft or an overabundance of packages in a given location.

Q The flexibility of routing is very important in your system?

A Absolutely. We would not be able to operate this system without total flexibility in aircraft routes.

Q Let me pass you what has been pre-marked —

MS. HARRISON: Your Honor, I move Introduction of Exhibit No. 4.

THE COURT: Received.

BY MS. HARRISON:

Q I pass you what has been pre-marked as Exhibits 5 and 6. Can you identify those for us?

A Yes. These exhibits depict in general terms the flight schedule of Federal Express and you can see that this schedule is actually September 1986. These were the exhibits which we used to

depict the flight schedule in our application to operate the DC10 service to Japan.

But it does, while not totally accurate today in terms of the precise routing of the traffic, gives you a picture of the inbound shipments to Memphis on Exhibit 5, and outbound — inbound movement of aircraft on Exhibit 6.

Q Today, you have more flights than are shown on Exhibits 5 and 6?

A That is correct.

Q Some 75 average a day.

A That's correct.

MS. HARRISON: Your Honor, I move introduction of Exhibits 5 and 6.

THE COURT: Received.

BY MS. HARRISON:

Q I pass you what has been pre-marked Exhibit 7. You have described the DC10 aircraft that you utilize in your truck operation and pass you exhibit pre-marked as Exhibit 7, DC10-30 aircraft. Is that a diagram of the type DC10 aircraft you use?

A This is a diagram showing the container availability on the DC10. This is a DC10-30 aircraft, dash 30F aircraft, which is the largest aircraft that Federal Express operates. You will note it has a maximum cargo capacity of approximately 175,000 pounds, and it would — as you can see, the upper deck has 51 containers of this particular size, and the lower deck, 26 LD3 containers?

Q These containers that are shown here on this DC10-30 aircrafts, are they air cargo containers?

A Yes. They are air cargo containers which are the typical air cargo container utilized with this particular type of aircraft. There would be other types of containers but these are known as the standard air cargo containers.

Q And you utilize air cargo containers on your 727s?

A That is correct.

Q And you also utilized the same air cargo containers on the trucks that you utilized in your system?

A That is correct. We also designed — Federal Express has designed cargo containers that can be split, in effect, split into pieces to accommodate lesser amounts of traffic that can then be reassembled at the container configuration for movement in the aircraft.

But all of the traffic moved by Federal Express in the truck system, either in a truck or in an aircraft, moves from the station to designation in air cargo containers. And this system is an aviation and air cargo system. We certainly utilize motor vehicles for access to the airport facilities and virtually all of these cargo containers, whether they're moving in a truck or moving in aircraft, are moved to or from an airport.

MS. HARRISON: Your Honor, I move for the introduction of Exhibit No. 7.

THE COURT:Received.

BY MS. HARRISON:

Q Now, I'm passing you two photographs pre-marked as Exhibits 8 & 9.

MS. HARRISON: And Your Honor, these are the only copies we have.

THE COURT: All right.

BY MS. HARRISON:

Q Are those pictures of the flight simulator, one of the flight simulators used by Federal Express to train its pilots and employees?

A Yes. Exhibit 8 shows the exterior of the simulator. Exhibit 9 reflects — pardon me, the interior of the simulator. We have the capability and do, in fact, train Federal Express pilots, as well as pilots of other air carriers in both the 727, as well as the DC10. We have a total of three simulators, two 727 simulators, and one DC10 simulator and the training facility which is a building utilized for the sole purpose of training and upgrading our own pilots, as well as occasionally pilots of other air carriers.

MS. HARRISON: I move introduction of Exhibits 8 and 9.

THE COURT: Received.

BY MS. HARRISON:

Q Mr. Cloud, I have put on the easel an exhibit pre-marked Exhibit 10, another map of the United States showing — labeled Feeder Route Map. Could you explain what is depicted on this map?

A Yes. In order to serve the smaller communities, less populated areas of the United States, and give to our customers in those locations the same quality of service that we give our customers in the major cities, we are required to utilize, as is shown, I think, in Exhibit 3, some 130 supplemental aircraft operations. These feeder routes or supplementals are utilized to bring traffic to the truck aircraft when moving the traffic into the Memphis hub or to distribute traffic from the truck aircraft into the smaller communities during the early day in order to accomplish 10:30 or noon delivery or our delivery commitment in areas which include 99 percent of the U.S. population.

This particular chart reflects all of those feeder routes. Some 70 of those aircraft are Cessna 208s. The remainder of those aircraft are various types of aircraft chartered from other companies operating these feeder routes.

MS. HARRISON: Your Honor, I move for introduction of Exhibit 10.

THE COURT: Received.

BY MS. HARRISON:

Q I pass you what has been pre-marked Exhibit 11, Mr. Cloud, labeled Federal Express Operations. Is this an outline of your operation prepared under your supervision for this hearing?

A Yes, it was.

MS. HARRISON: Your Honor, I move for introduction or admission of Exhibit 11 before we begin to go through it.

THE COURT: Received.

BY MS. HARRISON:

Q You list there you have 800 pilots, 272 aircraft mechanics, and so on. I think it's pretty self-explanatory. Seventy-five aircraft de-icers.

A That's correct. I would add that the 800 pilots which are shown on Exhibit 11 actually 800 pilots who are currently on the seniority list. We are training and in the process of hiring pilots that would result in a pilot group numbering at least 1,000.

Q You have your own field maintenance folks listed there, 127 aircraft mechanics.

A That's correct.

Q And so forth.

MS. HARRISON: Rather than go down all the way through this, Your Honor, the flight training simulator you have seen.

BY MS. HARRISON:

Q There is a flight control center right on the Memphis air hub property; is there not?

A Yes. We have our own flight control center where we monitor the entire operational system of Federal Express on a 24-hour per day basis.

Federal Express has one of the most extensive aviation-related flight control activities, including our own weather, individuals who interpret the weather, which is far more important to us than even to a passenger carrier. Our system is thrown of[sic] by a factor of only 15 minutes on a given evening. The cost to Federal Express is tremendous in that we only have approximately two hours and 15 minutes for delivery of all these packages in the early a.m. We therefore — if you lose 15 minutes, you can tell what percentage of that traffic would be delivered late, would be delivered at a time later than our proposed time to our customer and I think someone mentioned earlier, we do refund the money to our customer if a late delivery is made.

The Meteorology Department actually carefully analyzes the weather at each aircraft location and if they deem there be a problem at any of those locations, they communicate with our flight operations group who then re-schedule[sic] — in fact, may re-schedule[sic] virtually the entire system in order to make certain that the system works well in spite of the fact that weather may be very difficult in certain areas, in the northeast, for instance.

We operate our system on an on-time basis, and that means on time, not within 15 minutes on on time, but absolutely on-time basis of approximately 98.5 percent of the time.

Q The spare aircraft you utilize — those are the chase planes, so to speak, we referred to earlier?

A There are descriptions of two or three different types of spare. One of the big differences in Federal Express, in the express industry and the passenger carriers is the Federal Express can't afford to cancel a flight. We do everything possible to keep from canceling a flight and delaying the transportation of — we have a total of nine aircraft that are designated spare aircraft. Many of the passenger carriers, Northwest, for instance, does not maintain even one spare aircraft in its operations.

Again, because of the military-like requirements that our system work absolutely, positively on time each night and that each package tendered to us make the hub sort in Memphis, Tennessee, we actually utilize a total of nine aircraft as spares in the system each day.

Q You have a separate quality control operations for your aircraft that's listed there. Let me pass you what's been pre-marked —

MS. HARRISON: And I apologize, Your Honor, pre-marked as Exhibit 11A because of the — I know Your Honor doesn't like sub-exhibits. It's part of this one. It wasn't intended that way.

THE COURT: That's all right.

THE WITNESS: Federal Express is very heavily regulated by the Federal Aviation Administration and the Department of TRansportation, as are all other air carriers. All of us have read extensively in the past and recent past about the problems of aviation and regulatory stance of the Federal Government.

In order to monitor our compliance with the various rules and regulations imposed upon us by the Federal Aviation Administration, which primarily have to do with safety of operation,

which have to do with the safe operation of aircraft, the appropriate training of mechanics who have to be certified by the FAA, pilots who are required to be certified by the FAA, we maintain an entire staff. As you can see, the training area of 29 instructors; the quality control which involves the monitoring of our compliance; 43 individuals are involved in that activity in the aviation area.

Certainly in the aircraft and ground support area, we again have to maintain the same quality of GE equipment as aircraft. If the equipment on the ground doesn't work to get it on the airplane, we've got to refund the money to the customer.

We also have a very extensive — I would think one of the most extensive development engineering groups, R&D groups in the aviation industry. Because again, Federal Express must accomplish its mission each evening. And in order to do so, when you understand what happens in the weather and it's very easy if you have listened to the news in Nashville, Nashville's weather was zero zero yesterday morning.

We do everything possible to assure that our aircrafts utilize equipment, the latest technology. We, in fact, go far beyond in the equipping of our aircraft, far beyond the equipment utilized by many passenger carriers. We even go further to the extent of trying to develop on our own systems that give us the ultimate in reliability.

You'll notice on Exhibit 11A certain activities in which Federal Express has been involved to upgrade the safety and reliability of our aircraft. Item number two. 727 100 Supermod was a project where we took aircraft — perfectly certified by the FAA and spent approximately $60,000 in refurbishing those aircraft so that the reliability and the safety factors of the aircraft were enhanced substantially.

As a matter of fact, those Boeing 727 100s coming out of the

Supermod are, in fact, better aircraft than they were when delivered new from Boeing, because and the industry having understood all of the various problems that might have existed with Boeing 727 aircraft throughout its history, corrected each of those problems, making it a far better airplane than that airplane was when new.

We have in our simulator — one of our simulator programs a heads-up cockpit display which is a new technology making landings in adverse weather much easier. We have, in fact, on one of our simulators a wind sheer program which FAA utilized when researching the Delta crash in Dallas to determine the effect of the wind sheer on what was an L10-11 flown by Delta—

THE COURT: Just a minute, Mr. Cloud.

Ms. Harrison: This is all very interesting, but I'm having some difficulty seeing the relevance.

MS: HARRISON: Your Honor, it's our position, as we stated in our trial brief, first of all, that Federal Express, one, is clearly an air carrier and operates an integrated system which is directed toward delivery of goods on time.

And what they do with regard to their airplanes to make sure they can fly, to make sure they can get goods there on time is part of the entire integrated system, and shows the character, status of that system.

THE COURT: Ms. Harrison, you move along now and don't go into all this great detail. This testimony is irrelevant to the issues before this Court in my judgment. I'm going to bear with you to some extent. But I want you to speed this thing along.

MS.Harrison: The remainder of the Exhibit 11A sets for the A description of the quality —

THE COURT: I've read Exhibit 11A, Ms. Harrison, and it's part of the record. Now move along.

BY MS. HARRISON:

Q I pass you what has been pre-marked Exhibit 12 and 13, picture and description of the Memphis superhub facility.

A Yes. Exhibit 12 is a picture of the superhub. This picture actually would have been taken on Thanksgiving Day which is the only day where all the Federal Express aircraft would be at the hub during the daylight hours.

Again, this picture quite simply depicts Federal Express' operation with all of its aircraft at the Memphis superhub which is located on the Memphis Airport, as you can see.

MS. HARRISON: Your honor, I move for introduction of Exhibit 12.

THE COURT: Received.

BY MS. HARRISON:

Q Exhibit 13 is an outline showing what the facilities are and the uses of those facilities at the Memphis airhub; is that correct?

A That is correct.

THE COURT: It will be received.

BY MS. HARRISON:

Q Now, on the picture, Exhibit 13 shows airplanes along the side of the U-shaped building and some planes behind that; is that correct?

A That's correct.

Q Where do the trucks to the extent they come in to this facility unload?

A Well, if you'll notice in the portion of the picture which I would say about 1:00 portion of the picture, there are a few trailers shown located at the top of the picture. Those vehicles would be unloaded at the rear of the hub. You're calling that the bottom of the "U". The trailers on which air cargo containers would be located and filled with packages would actually be transported by bus or by the vehicle itself to the back of the sort facility room.

Q The trailers containing the air cargo containers from the trucks come into the bottom of the "U", as well as containers from the airplanes in the back there?

A There are about five, as you can tell from the other exhibits, there are about five locations where air cargo containers are input into the system by aircraft, and at really a single point by truck.

Q We put on the easel, Mr. Cloud, an exhibit that has been pre-marked 14, a map of Tennessee and also you have before you a pre-marked Exhibit 15.

Looking at the map —

MR. WILLIS: Can Your Honor see that?

BY MS. HARRISON:

Q — map of Tennessee, can you use this to explain in general terms your operation in the State of Tennessee?

A Yes. The operation in Tennessee with the facilities already depicted on Exhibit 15 for identification, the operations in Tennessee center around three locations, Memphis, Nashville, and Knoxville. And actually, traffic is transported in three substantially different manners between those areas, and we'll start with the eastern portion of Tennessee which is primarily served by the Knoxville facility.

It's very difficult to see the blue line which depicts the service area of the Knoxville facility. But it runs along the border of

Tennessee and then approximately half-way between Nashville and Knoxville.

Q Come down, Mr. Cloud and illustrate it.

THE COURT: Mr. Throgmorton, there's a pointer over there somewhere I think.

MR. THROGMORTON: I was trying to find it. It's not over here, sir.

THE WITNESS: Okay. The service area of the Knoxville facility on where the truck aircraft operates from Knoxville to Memphis includes everything in Tennessee to the state line and everything east of the line beginning somewhere around Fayetteville I tracked here to the east of McMinnville, and up through Red Boiling Springs, Tennessee.

The Knoxville — and I'll go ahead and point out the other areas. the area served by the Nashville — primarily by the Nashville facility is bounded by that same line on the east of Nashville and the Tennessee River, and everything in that general area would be served by the Nashville Facility.

The remaining area would be served by Memphis or a facility at Jackson, Tennessee. The Memphis facility actually handles traffic up to and including approximately Covington. Everything else in West Tennessee and that western section of Tennessee is assembled and moved to Jackson for line haul transportation or truck transportation to Memphis.

And in that area, the described area surrounding Knoxville, the operation which is conducted on a daily basis in that area by each courier in that area would involve the pick-up of traffic from a number of sources, one, directly from customer premises; two, from drop boxes in the area; and three, from Federal Express facilities. All of that traffic would be loaded into air cargo

containers at the station locations which are listed in 15 and are included in that area. That primarily, as I recall, would be Chattanooga, Tennessee.

All traffic is loaded into the air cargo container, is then loaded on a CTV, which is a container transport vehicle utilized throughout our system to transport traffic to and from — primarily to and from aircraft or airports.

That CTV is designed — it is a totally different animal than anything operated by what is known as a general commodity trucking company in that it has a roll-a-bed capability so you can actually push air cargo containers on and off the truck. The unit itself is equipped with scales so that as a container is loaded or off-loaded from that vehicle, we can obtain the appropriate weight for the weight and balance activities on aircraft.

In any event, all of the traffic that is assembled in the eastern section of Tennessee is transported in air cargo containers to the Knoxville airport.

A 727 operates from Charleston, West Virginia into Knoxville, arrives Knoxville, all of the traffic, whether that traffic may move between two points in East Tennessee, or whether that traffic may move from a point in East Tennessee to anywhere on the world is bulk loaded onto those containers, loaded on the 727 in Knoxville and transported to the Memphis hub at which point the containers are off-loaded from the aircraft which I think you;ll see on the video.

In the middle portion of Tennessee, there is a different operation. Again, all of the traffic throughout the middle portion of Tennessee at the station is depicted in Exhibit 15.

THE COURT: Let me stop you for just a minute.

THE WITNESS: Yes, sir. That package would move — again, this is a system designed to accommodate traffic moving everywhere. And that system, in order to be an accurate system, forces us to do everything the same way. Even if it were moving between two points in Elizabethon, it would actually be transported to the Knoxville Airport, flown to Memphis, back to Knoxville and back to Elizabethon for delivery.

BY MS. HARRISON:

Q You're continuing on about the Nashville operation?

A The Nashville operation differs from the East Tennessee operation in that we utilize two different types of line haul truck transportation serving that Nashville area. We operate two CTV's each evening from Nashville, Tennessee, to Memphis, Tennessee. Again, after the traffic is consolidated precisely the same way in the Middle Tennessee area that's done that I described in East Tennessee. The early arriving containers or early arriving vans and traffic are loaded onto a CTV into an air cargo container, and into a CTV, the last one of those CTV's departs Nashville about 9:00 p.m. would arrive at Memphis somewhere around midnight. Again, the air cargo containers are off-loaded as are all air cargo containers at the airport in Memphis and put into the sort.

However, in order to give the late delivery which Federal Express really is know for throughout its system, we also operate each night a Cessna 208 from — it originates in Bowling Green, Kentucky; it flies into Nashville, I believe it arrives in Nashville at 10:15 and departs at 11:00 p.m. I'm not sure exactly what that schedule is.

But in any event, a departure time of 11:00 is made with the Cessna 208 each operating evening. Now that Cessna 208 transports all of the traffic which is assembled between approximately 8:30, 30 minutes prior to the departure of the CTV, and 11:00.

So traffic which originates in this middle portion of Tennessee can either move truck or it can move air. We never know from day to day whether the traffic — a particular shipment is going to move truck or whether it's going to move air.

Q It depends on what time the courier unloads.

A It's dependent — it's really dependent altogether on the system. If we have a demand for services by a customer in a given area, any one of the Nashville couriers can be making very late pick-ups and be required to put all the traffic that day from their vehicle onto the Cessna 208. We can't tell — Federal Express can't tell you at the start of the day or when we receive a request for a dispatch whether a particular shipment, particular item from, let's say, Murfreesboro, for instance, will move to Memphis by truck or whether that particular shipment will move by air.

As a matter of fact, on one day it can move truck and the next day it can move air. There's literally no way for us to predict what method of truck transportation will be utilized on any shipment that originates in the middle portion of Tennessee.

The majority of the traffic in terms of numbers would move on the two CTV's without any question. There would be approximately seven containers — I'm sorry, there would be approximately six containers of traffic, as I recall, moving from Nashville to Memphis on the truck, the Cessna 208 is capable of handling about 4,000 pounds of traffic each evening.

Q The CTV is a traffic transport vehicle.

A That's correct.

Q The flying spares that you talked about previously, depending upon the conditions in Nashville could also and have also stopped in Nashville and picked up the packages that would normally travel on the CTV's and move into Memphis also.

A On occasion, that would be necessary. I can't say how many times that's happened. But on occasion, it would be necessary. In particular, as related to the ice-type storms we're familiar with that happens here one or two times a year.

But in general terms, the Nashville market place is served by CTV, as well as the Cessna 208.

Q Moving on to West Tennessee beyond this blue line down to Memphis, back across the boundary of Tennessee, how is that area served?

A The western portion of Tennessee is served by the consolidation of traffic for every point in West Tennessee with the exception of cities located in the very — very near to Memphis, Millington and that sort of thing are all consolidated in our section in Jackson and loaded into cargo containers in Jackson, Tennessee, and moved from Jackson by CTV to the hub. This traffic we're talking about is very clearly set forth again in Exhibit 15. The volumes of traffic involved on an outbound basis per day would be from the state of Tennessee, 11,000, an average of 11,582 shipments —

Q Is that the entire state?

A That's from the entire state. That would be traffic moving from this entire state to points located throughout the world. And there would be included in that whatever volume of single-state traffic might have been generated by Federal Express in a given day.

Q Looking at Exhibit —

THE COURT: Wait until another question is asked, Mr. Cloud. You're a rather voluble witness. Wait and answer Ms. Harrison's question.

THE WITNESS: Okay, sir.

THE COURT: Quit making speeches.

BY MS. HARRISON:

Q Assuming the Public Service Commission — strike that.

In the last year or year and a half Federal Express has experienced two stops by the Public Service Commission; is that right?

A That is correct.

Q Where did it occur?

A It occurred in the Knoxville area. Two CTV's were stopped. One of the CTV's was delayed 45 minutes and one of the CTV's was delayed an hour and 15 minutes, which is approximately one-third of the delivery window on that traffic. All of that traffic, as has been explained, was interstate traffic. We necessarily missed the delivery on at least one-third of that interstate traffic.

If the Commission is allowed —

THE COURT: Wait, wait, wait, Mr. Cloud.

We're going to take a recess and I'll let Ms. Harrison confer with you. We're going to operate this thing on a question-and-answer basis.

We'll take a 15-minute recess.

Ms. Harrison, you confer with your witness.

MS. HARRISON: Yes, sir.

(Whereupon, court was recessed, then resumed, and the following proceedings were had:)

MR. WILLIS: Your Honor will permit me to speak to the court?

THE COURT: Yes, sir.

MR. WILLIS: Your Honor, I want to apologize to the court and Mr. Cloud. I'm afraid the matter that Your Honor interpreted to be Mr. Cloud turning onto an advocate on the witness stand as opposed to a factual witness, the blame for that can be placed at my feet. I visualized this case as being one where we needed to show the current organization and the current structure of Federal Express and what the impact would be upon Federal Express in the event it was determined that the Airline Deregulation Act did not preempt the type regulation being served by the Public Service Commission.

We realized we had an awful lot of material to get before Your Honor in a short period of time and our discussions with Mr. Cloud, we emphasized that one of the things he should express an opinion on would be the impact on the organization in the event the Public Service distinguish 191 parcels traveling in the State of Tennessee is going to do.

. . . .

It's our position that we've got exceptional circumstances all over the place, for abstention for undue burden and either under the Constitution or the 1302 and 1305, this Court must declare that the State has no right to regulate the rates, routes, and services of Federal Express.

THE COURT: Mr. Walker? Mr. Walker, you wanted to address the issue of res judicata. I'll hear you.

MR. WALKER: Thank you, Your Honor.

THE COURT: But you may also address the entire case.

MR. WALKER: Your Honor, the issue of abstention is no longer an issue in this case. There no longer is a pending State Court decision. There is no longer any reason for you to abstain to await the outcome of that decision.

The whole idea of the doctrine of abstention is that if you had agreed with us on abstention and waited until the States Court had ruled, then you would not have needed to address the merits of this case. In other words, there would have been a final decision of the States Court on the merits and that would have re Judicata application on those issues for these parties.

SUPPLEMENTAL APPENDIX I

TRANSCRIPT OF RECORD
Before the
TENNESSEE PUBLIC SERVICE COMMISSION
NASHVILLE, TENNESSEE

DOCKET NO SMC-977

IN THE MATTER OF:

SHOW CAUSE ORDER AGAINST FEDERAL EXPRESS CORPORATION

Nashville, Tennessee
September 24, 1986

MARGARET HEATH
Court Reporter

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[LARRY GLASSCOCK]

Q. Now you mentioned Federal Express as competitor, do you consider Federal Express as a competitor for Tennessee intrastate ground traffic?

A. Oh, absolutely, because we consider the market to be overnight and second day. The delivery of time sensitive materials, and because of their market share, they have to be considered the primary competitor.

Q. So you would not only say competitor, but primary competitor?

A. Absolutely.

Q. Now, what if any difference does it make that Purolator is regulated, as you have mentioned, on this Tennessee intrastate ground traffic and Federal Express is not?

A. Well, from a sales and marketing standpoint, it is a point of confusion, because we will go into a customer, or potential customer with pricing information, and in the case of a large national account, shipment volumes in the industry are primarily based on total volume. When Purolator Courier calls on a national account, for example, based in Nashville, we will offer them a discount on everything traveling outside the state, based on total shipment volume, which is consistent with the way most of the other companies price their discounts, but on the intrastate traffic, it is based solely on the number of shipments tendered per day, and it is quite possible that the customer has to pay higher price for a shipment moving from Nashville, Tennessee to Smyrna, Clarksville, Franklin, whatever, than they would on a package moving from here to New York. That's something that the customer finds difficult to accept. It is also an inconvenience for them, because in the case of a large account, they spend a significant amount of time auditing freight bills, and there is a certain amount of dues abuse that they look for when considering a transportation company.

Q. Does it cause any confusion in your own operation?

A. Well, yes, it does. As I mentioned we have a network of customer service centers located in Basking Ridge; Indianapolis, Indiana, and Dallas, Texas. Because of the Purolator Courier intrastate operating tariffs the rates, the varying size restrictions, and so forth, we have had to establish a network of specialty desks, and any time a customer call goes into the CSC, and the question is identified as involving an intrastate shipment, it is automatically referred to that desk. For example, if a customer is calling in requesting rate or size information, or service information from Nashville to Knoxville, he is automatically assigned to the specialty desk. If that customer then has a question about a package from Nashville to Los Angeles, California, it is called a switch-back to the normal customer service network, and it gets frustrating from time to time for a customer, because there is this constant switching back and forth, but we found that to be a necessary step to insure our compliance with the various operating authorities. Locally, it can be a problem, because of the difference in size and weight restriction between our regional and national products, and our intrastate products. For example, a customer that normally sends a 100 pound package out of the state to varying locations may bring a package into a terminal, or call in and request a pickup on a package that weighs 100 pounds, that is destined for Memphis, Tennessee. We can't handle that package, because that is outside of our operating authority.

Q. And does the. . .of course, being unregulated Federal Express has more flexibility and how it changes things. . .

A. Sure from a pricing standpoint, they have a great advantage. They can simply price to the levels necessary to close the account. One of the things that we ran into about a year and a half ago, we sought to increase our size and weight restrictions intrastate Tennessee to be consistent with our regional pricing philosophy and size restriction philosophy. We were simply following Federal's lead to 125 pounds, excuse me to large sizes.

Shortly after we filed that application and it was granted, they increased their size restriction to 125 pounds, and not long after that it went to 150 pounds. For us to follow that we have to file for that additional authority.

Q. The last time your removed your length and girth restriction and increased the aggregate weight from 100 to 300 pounds. What was involved in your accomplishing that?

A. Several months of time before the Commission; several, several witnesses involved, and an awful lot of expenses.

Q. You had several days of hearings in Memphis and in Nashville and in Knoxville?

A. That is correct.

Q. And Federal Express would not have to do that?

A. No, sir.

Q. What about in billing? Does Federal Express enjoy any advantages of being unregulated as far as billing practices?

A. Again one of the problems with an intrastate rating tariff is that we have to setup a separate billing module in our automated billing system. In other words any data that is input involving an intrastate Tennessee shipment is rated on a completely separate billing module to insure that the customer receives the correct intrastate Tennessee rate.

MR. SANFORD: You may cross examine.

CROSS EXAMINATION

BY MR. EVANS:

Q. Mr. Glasscock, first, does Purolator Courier hold any interstate authority from anybody in terms of a certificate or a permit that is issued specifically to Purolator? I am not talking

about can you operate under any exemptions, but do you hold any sort of authority as an air carrier?

A. As an air carrier?

Q. Yes.

A. Yes, sir, to the best of my knowledge we do.

Q. Sir?

A. I am not as familiar with that as Mr. Labrada would be. Maybe that question should be directed to him.

Q. You don't know whether you have any air authority?

A. I just don't feel like I am the proper person.

Q. You don't advertise as being an air certificated carrier?

A. Advertising is geared toward the overnight second day delivery of time sensitive materials. I don't know that there is any reference made to certification.

Q. You don't recall ever seeing any Purolator advertising which represented to the public that Purolator was a certificated carrier of some sort?

A. Not to the best of my knowledge, but again Mr. Labrada would be the correct person to address that.

Q. Well, being a regional supervisor, I would think that you would be generally familiar with it if there were any such advertising. Wouldn't you think so?

A. I don't recall any reference in advertising materials to an air certificate.

Q. Now, it is at your election that. . . . . .the essence of what you are telling us is that there are differences which arise between your situation and that of Federal Express because of

your being regulated by the Tennessee Commission, and Federal Express not being regulated. Isn't that correct?

A. Yes, sir.

Q. And Purolator made its own election to be regulated, did it not?

A. Yes, sir, our understanding. . . .yes, sir.

MR. EVANS: All right.

MR. SANFORD: Your Honor, please, I want to object to that question coming from counsel. Mr. Evans who is thoroughly experienced with the fact that the law controls. . . .it is not a matter of asking this lay witness some question of that nature. I don't think that is quite proper for a question. Mr. Evans well knows that the law determines whether Purolator complies, not Purolator's wishes as to whether or not it would comply.

ADM. JUDGE: Well, I think we have given the question far more attention than it deserves. Let's move on.

MR. EVANS: Sir:

ADM. JUDGE: I think we have give the question far more attention than it deserves. Let's move on.

A. Sir, when I joined the company six years ago we were a regulated carrier.

Q. You didn't personally make the election to be regulated. Is that what you are telling me?

A. No, sir, but I do my best to make sure that we comply with that regulation.

Q. To the extent you understand you have to comply?

A. Yes, sir.

Q. Now, are there any alternate ways that you can handle the shipment in alternate rates on which you handle a shipment going between any two points in Tennessee which depend upon, or vary according to the manner of packaging of the shipment?

A. There is an optional portion in the tariff that allows us to price a PuroLetter on PuroPack separately from general commodities shipments, if that is what you are referring to.

Q. Well, if it is in one of those Purolator envelopes it is priced differently?

A. No, sir.

Q. Is that what PuroPack is?

A. Yes, sir, that is a company provided container, but in the Central and Eastern Tennessee area, the billing office in Nashville is responsible for . . . .every customer is rated, based on the general commodities rate tariff.

Q. Are you saying that the Central and East Tennessee, there are no shipments handled intrastate accept on the general tariff?

A. The general commodity tariff, yes, that is true.

Q. And if there is no variation in that, dependent upon that, either that or any other tariff, that you handle that shipment under. . . .dependent on whether or not it is in one of your packs?

A. That is correct.

Q. And do you have an alternative way of shipping, let's say, between Nashville and Knoxville conceivably going through Indianapolis by air?

A. It is an alternative, you know, for example, if there were bad luck and the roads were closed during the winter, sure if the plan flys and the truck doesn't run we are going to fly that package through Indianapolis, because service comes first. Normally that

is not an option of this exercise, because the vehicle that services the Knoxville area doesn't leave Nashville until over an hour and a half after the airplane has departed.

Q. Does the rate vary depending upon whether it moved by air?

A. No, sir.

Q. The rate is not any different whether it moves by air or ground, between any two points in Tennessee?

A. No, sir.

Q. The rate is not any different between any two points in Tennessee whether it moves in a Purolator Pack envelope or does not move in such an envelope?

A. No, sir, and as far as moving the package late at night, that is simply to allow us to be competitive with the Airbornes, the Emory's and the Federal Express' who also offer late pickups. It is also rated as an intrastate shipment to reduce the confusion to the customer, because otherwise the customer would be given a price on a package picked up, let's say if until 8:00 o'clock at night. If he tenders a package after that, there will be a premium on that package because it would be billed at a higher rate.

Q. Well, that is what I wanted to ask you. Do you have two different charges?

A. No, sir.

Q. Wait a minute. . . . .both of them reflected in your tariff are the two different charges, intrastate shipments depending upon what time of day pickup is requested and made?

A. No, sir.

Q. Well, what is the premium you said for after 10:00 o'clock?

A. I am saying if a package because it was picked up at 10:00 O'clock in Knoxville, Tennessee, and moved via Indianapolis to Memphis, if you are suggesting that that is to be rated as an air shipment or a regional shipment. . . .

Q. Excuse me. I am not suggesting anything. I am just trying to get to the bottom of how you do it.

A. We think that that is too confusing to the customer, and we should rate it as an intrastate shipment.

Q. And your intrastate shipments have one charge, and only one charge. . . .

A. Yes, sir.

Q. . . . . .regardless of how they move between points in Tennessee, and regardless of how they are packed, and regardless of the time of day they are picked up, or the time of day they move?

A. That is correct.

Q. Are you familiar with your tariff in Tennessee?

A. Yes, sir.

Q. Have you. . . .or could you tell us without having it before, or do you want to take a look at this tariff, I am about to ask you a question about?

A. I am sure you are going to ask me about the Purolator or PuroPack portion of the tariff.

Q. Price for Purolator envelopes, priority regional Purolator letter service. This is in Section 2, captioned Specific Commodity or Service Rates. Now, does not this tariff provision, revised page 34, provide for different prices based upon packages in a Purolator envelope?

A. Yes, sir, it does, but when that was introduced into the tariff, I was told that that was an optional rate item and we do not charge them. The reason is. . . .there are three things that are throughout this market - service quality, ease of using and pricing. Service quality is, again going back to late pickups, and moving shipments from Point A to Point B, the way the customer wants. Ease of use involves rating. Customer service options and that type of thing, and pricing needs to be as simple as possible, and we are not charging a separate price for a Purolator in a PuroPack move.

[ARMANDO LABRADA]

A. My name is Armando Labrada.

Q. And you might spell that for the court reporter.

A. It is A-r-m-a-n-d-o L-a-b-r-a-d-a. I work at 131 Morristown Road, Basking Ridge, New Jersey for Purolator Courier Corp.

Q. You might spell Basking for the reporter.

A. B-a-s-k-i-n-g Ridge.

Q. And you work for Purolator?

A. Yes, sir.

Q. And what is your present position?

A. My present position is Vice President and Associate General Counsel Assistant Secretary for Purolator Courier Corp.

Q. And what generally are your duties and responsibilities in that position?

A. Generally I am responsible for the legal affairs of the whole company, which includes our automotive products group, so far as they arise from the operations of the company. In that capacity I am responsible for counseling management on marketing, regulatory matters, international developments and labor law and unemployment matters.

. . . .

Q. Now you heard Mr. Glasscock testify as to some of the difficulties that Purolator has encountered on a Tennessee basis as a result of being regulated while Federal Express is not. Could ;you add anything to that?

A. No. I would just confirm those difficulties particularly as a legal advisor, it is sometimes hard to explain to our marketing people why in some cases they may have to charge a higher price for a shipment that is traveling a shorter distance to the same account who is giving us shipments that are going to California, or even further distances, why we can't have a uniform rate structure for people? Why we can't. . . . .why our advertising has to have disclaimers? Why we have to have complicated billing systems, etc.

Q. Now what is Purolator's position with respect to the matters at issue in this proceeding?

A. Well, Purolator's approach to intrastate regulation has traditionally been pragmatic rather than ideological. In those states where we have to comply we have complied with the system. We have taken advantage of it when it protects us from entrance.

ADM. JUDGE: Very well. I will permit the question.

MR. EVANS: Would you please explain to us the justification, and how it is that you apply. . .you have those two different rates, and your regional manager said, as I understood him, that we were told not to use this. . .disregard it, but there it is. Have you used it or have you disregarded it?

A. Let me try to give you some background on it, at least my knowledge of that process. In early 1984 we marketed PuroLetterrs as an air product that was supposed to move by air and were priced at a uniform price to every customer in the country

whether it went two miles or seven miles. Our marketing people and our sales people found very reluctant. . . . .at the same time we adopted the policy if movement in those containers was within a border of a state that was regulated, they were to apply the tariff within those states. So that if somebody put something in a PuroLetter and it weighed one pound that resulted in an $8.00 charge, as opposed to the $14.00 charge that we were going to charge them for going across the state border, we would comply with the state requirement and rate that as an intrastate shipment regardless of the container. In late '84, early '85, the marketing people wanted to market a national PuroLetter product, and have a uniform simple. . .simplified price point that they could advertise, and say, you know, for Purolator "X" price anywhere in the country. In order to be able to do that, I advised them that they had to file tariffs in each of the states where they wanted to do that for an intrastate movement, and distinguish a PuroLetter from a regular general commodity type movement. When we did that there was tremendous resistance on the part of customers saying, well, wait a minute, if I put it in a brown. . . .in my own envelope you have to charge $8.00, but if I put it in your envelope you are going to charge me $12.50 or whatever the price is at the time. At that point, I said, as far as I am concerned you have the flexibility to charge the customer the lowest price that he is entitled to under a regulatory scheme; therefore, I couldn't see why someone would ever complain that we didn't charge them a higher price.

MR. EVANS: So if you put this in for the purpose of your national advertising program. . . . .

A. We are in the process of withdrawing those tariffs, and then deciding whether we are going to fly all of the PuroLetters to Indy and back. Maybe we will use. . . .maybe in fact the carriage of letters of PuroLetters is exempt from state regulation under the Postal Preemption Statute.

Q. Well, is that the position you take?

A. We don't know. We haven't made a final decision on that.

Q. Well, for the time being is it your testimony that you are going back to one tariff, one rate, only one charge for the Tennessee intra?

A. Yes. If we withdraw the PuroLetter and PuroPack problems. . . .I mean the tariffs, packages moving intrastate will be rated according to the intrastate tariff regardless of the container that is being used for those shipments.

Q. And that is what you are doing now, isn't it?

A. Yes, sir. Unless we are free to do otherwise.

Q. Sir?

A. I mean in an unregulated state we would charge the highest price we could, you know, get from the customer who is willing to pay.

Q. Well, in this case you have treated this as unregulated, haven't you?

A. No, we tried to comply by filing tariffs in those states which purported to regulate. That is where the problem was. When we tried in effect to raise the price to customers who were paying low or local prices for regular packages, the marketing decision, we said, well we will charge the lowest price.

MR. EVANS: I think that is all.

MR. SCHOLES: I just have a couple of questions.

CROSS EXAMINATION

BY MR. SCHOLES:

Q. Is the option as far as the PuroLetters and the PuroPacks that you were talking about, that option is not included in the language of the tariff, is it? That you could either go under the general commodity or under the PuroLetter?

A. I am not intricately familiar with that specific language of the tariff.

Q. That is something that you instructed in this. It doens't appear on the face of the tariff?

A. It was an attempt to try to charge a higher price for a national product, which met with considerable consumer resistance. We could have just withdrawn the tariff, but, you know, and we are in the process probably of doing that in any case, and just say we are either going to fly them all to Indy and charge any price we want, or we will treat them just as a container, as a wrapper when it moves within the same state, and at our. . .you know. . . .we will have to make those operational and marketing decisions.

Q. The only other question I have is I am not real clear on the type of certificate that you describe that you got from the FAA which you think is going to be revoked at any time. Was that under Section 4 of the. . .

A. I think it is. . .yes, sometimes I get lost in the jargon, but it was, I believe a 418 certificate exempting us from compliance with 121 of the FAA Act which has all of the operational control of aircraft, so that we could argue at some point that we were an air carrier, a direct. . .I mean a certificated air carrier, and our primary motivation for that was labor strategy which would have given us the flexibility of putting us under the Railway Labor Act as opposed to the National Labor Relations Act if it became desirable for us to do that. We have abandoned that strategy. And

it was an interim step before we actually planned to have our own pilots and operate the planes direct. Another strategy which we have abandoned.

MR. SCHOLES: I have no further questions.

MR. SANFORD: I have nothing further.

ADM. JUDGE: I thank you. Anything else? Anything further to present? Any rebuttal? Anything from the staff? Any more witnesses? I see.

MR. SANFORD: We are ready for Your Honor to decide.

ADM. JUDGE: I don't think I will decide today. Would you all like to present anything like proposed initial orders?

MR. EVANS: I think we should submit a reply brief. We were handed a brief this morning. . .

ADM. JUDGE: Yes.

MR. EVANS: I think we are entitled to comment on that as well as the opinions expressed from the stand.

ADM. JUDGE: Well, would we like to . . . let's see we have got this brief.

MR. SANFORD: You had that. . . .their response is what the brief is replying to. They handed us that the day of the hearing, the last time, so we thought turn about was fair play.

ADM. JUDGE: I see.

MR. EVANS: Shouldn't we put the briefs in terms of proposed orders?

ADM. JUDGE: Let's put future briefs in the form of proposed initial orders. Do you all need the transcript for the hearing today?

MR. SANFORD: Yes, I will.

MR. EVANS: We should have that. There are some things in there we want.

ADM. JUDGE: Very well then. Due 30 days after the transcript is completed. How does that sound?

MR. SANFORD: Thirty days?

ADM. JUDGE: Would you prefer another time frame?

MR. SANFORD: No that is all right with me.

MR. EVANS: That ought to be long enough.

ADM. JUDGE: Very well then, we will make it due 30 days after the transcript is completed. Anything further to be taken up at this time? Very well, then, I look forward to your proposed initial orders, and we are hereby adjourned.

(WHEREUPON at approximately 11:30 a.m. hearing was adjourned).

SUPPLEMENTAL APPENDIX J

EXHIBIT 3 TO SEPTEMBER 10, 1987 HEARING

VOLUME VI

CERTIFICATE OF CONVENIENCE & NECESSITY NO. 2083-2-Z

2083-2-Z

Authorizing the transportation of general commodities except commodities in bulk, classes A and B explosives, household goods, and commodities requiring special equipment and subject to the restrictions shown below, moving in courier service over irregular routes between all points and places in the State of Tennessee. "Courier service" is defined as the expeditious transportation, including pick-up from shippers' premises or vault, and delivery to consignees' premises or vault of packages and articles on a regular schedule, or on call by the shipper. Service hereunder is limited to the transportation of packages or articles not to exceed 75 pounds each in weight, and weighing in the aggregate no more than 100 pounds, from any one consignee at one location in one day. Packages or articles shall not exceed 108 inches in length and girth combined. Pick-up and delivery shall be completed substantially within a twelve-hour period, or by noon of the day following pick-up. Service shall be restricted to pick-up and delivery of packages or articles to, from or between business addresses, or security vault locations, or for business purposes; provided business purposes shall not include packages to or from retailers and residences of customers of retailers, where such residence is not also used as the customer's place of business.

DOCKET NO. MC-4433 Sub 63
ORDER DATED May 19, 1976

2. That Certificate of Convenience and Necessity No. 2083-2-Z heretofore issued to Purolator Courier Corporation be, and the same is hereby, modified by deleting the length and girth restriction and by increasing the aggregate weight restriction from 100 pounds to 300 pounds.

Order dated December 27, 1984

CERTIFICATE NO. 2083-1-Z

Authorizing the transportation in intrastate commerce of the following commodities between all points and places within the State of Tennessee:

(1) Prosthetic devices, external and implantable cardiac pace-makers and related accessories;

(2) Pharmaceuticals (restricted to movements from, to or between medical or dental offices or facilities), laboratory shipments of chemicals, laboratory samples of drug products, human and animal laboratory specimen; samples and specimens of agricultural products;

(3) Opthalmic good;

(4) Denture bites, articulators, impression molds and related commodities used in dentistry;

(5) Medical, laboratory, and industrial testing instruments and replacement parts;

(6) Critical replacement parts, supplies, and assemblies used to maintain data processing and word processing equipment;

(7) Designs, blueprints, engineering drawings, accompanying documents and laboratory test reports, engineering tracings and prints; engineering specifications, engineering calculations, and engineering samples;

(8) Proofs, cuts, copy artwork, layouts, mats, video tapes, film and materials related thereto used in preparing advertising;

(9) Small parts used in the manufacture, replacement and servicing of computer, calculator typewriter and photo

reproduction equipment (restricted against the transportation of commodities or articles weighing in the aggregate more than 75 pounds from any one consignor to one consignee in any one day);

(10) Electric supplies, household appliances and electric accounting machine parts (restricted against the transportation of packages or articles weighing in the aggregate more than 75 pounds from any one consignor to one consignee on any one day);

(11) Critical replacement parts (restricted to exclude automotive parts and any other parts originating at an automotive supplier, and further restricted against the transportation of packages or articles weighing in the aggregate more than 50 pounds from any one consignor to any one consignee on any one day);

(12) Garments, including without limitation, shoes and boots, swatches of cloth, leather and other material used in the apparel trades, for samples, testing or research purposes (restricted against the transportation of packages or articles weighing in the aggregate more than 100 pounds from any one consignor to any one consignee on any one day);

(13) Cut flowers, decorative greens and related floral supplies;

(14) Whole human blood and blood derivatives.

DOCKET NO. MC-4433 Sub 40
ORDER DATED January 10, 1975

CERTIFICATE NO.
2093

Transportation of commercial papers, documents, written instruments, business records and microfilm, excluding coin and currency, bullion and negotiable securities, originating at or destined to banks or banking institutions, between all points and places in the State of Tennessee, over irregular routes.

DOCKET NO. MC-4433
ORDER DATED April 2, 1973

Transferred from American Courier Corporation

2093-A Transportation of exposed and processed film and prints, complementary replacement film, incidental dealer handling supplies and advertising literature moving therewith (excluding motion picture films used primarily for commercial theater and television exhibition); business records, audit and accounting media of all kinds, moving to a point for processing, or from a point following processing, between all points and places in the State of Tennessee, over irregular routes.

DOCKET NO. MC-4433 SUB 1
ORDER DATED April 2, 1973

Transferred from American Courier Corporation

Purolator Courier Terminal Information

1122 Lebanon Road	3977 East Raines Road	196 Gill Street
Nashville, 37210	Memphis, 38118	Jackson, 38301
87 Courier Guards	48 Courier Guards	14 Courier Guards
22 Clerical	16 Clerical	1 Clerk
1 Comm. Specialist	1 Comm. Specialist	1 Service Sup.
1 Billing Supervisor	3 Service Supervisors	
3 Service Supervisors	1 Billing Supervisor	
4 Management	4 Management	
3 Sales Representatives	2 Sales Representatives	
2 Mechanics	2 Mechanics	
123 Total Employees	77 Total Employees	16 Total Employees
52 Vehicles	38 Vehicles	12 Vehicles
1429 Ault Rd.	1415 Stuart St.	Rt. 7 Shipley Fry
Knoxville, 37914	Chattanooga, 37406	Blountville, 37617
44 Courier Guards	23 Courier Guards	15 Courier Guards
5 Clerical	1 Service Supervisor	1 Clerical
1 Management		
2 Sales Representatives		
1 Mechanic		
55 Total Employees	26 Total Employees	17 Total Employees
25 Vehicles	13 Vehicles	12 Vehicles

314 Total Employees
152 Vehicles
2 Aircraft YS-11 (MEM/BNA to IND and Return)
G-1 (TYS to IND and Return)

Purolator Courier Terminal Information

1122 Lebanon Road	3977 East Raines Road	196 Gill Street
Nashville, 37210	Memphis, 38118	Jackson, 38301
87 Courier Guards	48 Courier Guards	14 Courier Guards
22 Clerical	16 Clerical	1 Clerk
1 Comm. Specialist	1 Comm. Specialist	1 Service Sup.
1 Billing Supervisor	3 Service Supervisors	
3 Service Supervisors	1 Billing Supervisor	
4 Management	4 Management	
3 Sales Representatives	2 Sales Representatives	
2 Mechanics	2 Mechanics	
123 Total Employees	77 Total Employees	16 Total Employees
52 Vehicles	38 Vehicles	12 Vehicles
1429 Ault Rd.	1415 Stuart St.	Rt. 7 Shipley Fry
Knoxville, 37914	Chattanooga, 37406	Blountville, 37617
44 Courier Guards	23 Courier Guards	15 Courier Guards
5 Clerical	1 Service Supervisor	1 Service Sup.
2 Service Supervisor	2 Clerical	1 Clerical
1 Management		
2 Sales Representatives		
1 Mechanic		
55 Total Employees	26 Total Employees	17 Total Employees
25 Vehicles	13 Vehicles	12 Vehicles

314 Total Employees
152 Vehicles
2 Aircraft YS-11 (MEM/BNA to IND and Return)
G-1 (TYS to IND and Return)

SUPPLEMENTAL APPENDIX K

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CASE NO. 3-87-0633

FEDERAL EXPRESS CORPORATION
Plaintiff,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, *ET AL.*.
Defendants.

SUPPLEMENTAL, BRIEF OF THE TENNESSEE PUBLIC SERVICE COMMISSION ON ABSTENTION AND *RES JUDICATA*

Henry Walker
General Counsel
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Tennessee Public Service Commission

November 11, 1987

Introduction

Counsel for the Commission apologizes to the Court for two errors committed during the first round of briefs and arguments in this proceeding.

First, the Commission's pretrial brief on the abstention issue focused only on the *Burford* doctrine;[1] subsequent research has shown that the *Younger* abstention principle[2] is not only more applicable but, in fact, determinative of these proceedings.

The Sixth Circuit ruled last year in an unpublished decision that the *Younger* doctrine compelled the federal district court to dismiss a complaint brought against the Kentucky Public Service Commission. In that case, as here, the plaintiffs urged that federal law preempted the Commission's jurisdiction. There, as here, the plaintiffs also filed a state court appeal raising those preemption arguments. This case, a copy of which is attached, is discussed further below.

Counsel's second error was to assert during argument that plaintiff's sudden dismissal of its state court appeal mooted the abstention issue.

Further research has shown that the rule in the Sixth Circuit,[3] recently affirmed by the U.S. Supreme Court in the *Pennzoil* case,[4] is that the *Younger* doctrine is applicable if, at the time of filing the federal complaint, the plaintiff has the opportunity to raise his constitutional arguments in a state judicial proceeding. Other Supreme Court decisions have held that a plaintiff may not avoid

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[1] *Burford v. Sun Oil*, 319 U.S. 315 (1943), discussed in the Commission's earlier brief.

[2] *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed. 2d 669 (1971).

[3] *Zalmon v. Armstrong*, 802 F. 2d 199 (6th Cir. 1986).

[4] *Pennzoil Co. v. Texaco*, 481 U.S. __, 95 L.Ed. 1, 20 (1987).

the mandatory application of *Younger* by failing to pursue his state court appeals. These holdings are also discussed below.

Only if the Court finds the abstention doctrine inapplicable does the *res judicata* issue arise. The Commission's ruling on plaintiff's claim should bind this Court to the same extent it would bind a state court in a subsequent suit between these parties. The second section of the brief deals with the *res judicata* question.

I. *Abstention*

The abstention doctrine first enunciated in *Younger v. Harris*, and its progeny "represents a 'strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.' *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 432, 102 S. Ct. 2515, 73 L.Ed. 2d 116 (1982)." *Parker v. Comm. of Kentucky Board of Dentistry*, 818 F. 2d 504, 507 (6th Cir. 1987). The doctrine applies equally to pending state administrative proceedings. *Ohio Civil Rights Commission v. Dayton Schools*, 477 U.S. __, 91 L.Ed. 2d 512 (1986). Quoting from the *Younger* decision, the Sixth Circuit noted in *Parker* that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state court is not to issue such injunctions." *Parker, supra*, at 507.

Younger abstention, "born in a criminal context," is now "fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex, supra*, 73 L.Ed. 2d at 124. If important state interests are implicated in the ongoing state proceeding, federal courts should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L.Ed. 2d 994 (1979), quoted in *Blue Cross and Blue Shield of Michigan v. Baerwaldt*, 726 F. 2d 296, at 299 (6th Cir. 1984); See *Flynt v. Leis*, 574 F. 2d 874, 879-882 (6th Cir., 1978); reversed on other

grounds, 439 U.S. 438, 99 S. Ct. 968, 58 L.Ed. 2d 717 (1979); *Zalmon v. Armstrong, supra*, 802 F 2d at 201-202.

In *Parker*, the Sixth Circuit ruled that *Younger* compels the federal courts to dismiss plaintiff's suit [5] if (1) there are pending state judicial or administrative proceedings, (2) the state proceedings involve an important state interest; and (3) the state proceedings provide the federal plaintiff an adequate opportunity to raise his constitutional claims. *Parker, supra*, 818 F. 2d at 508.

In its petition for declaratory and injunctive relief, Federal Express asked this Court to prohibit the Tennessee Public Service Commission from enforcing state law governing the regulation of intrastate motor carriers. At the same time, Federal Express sought identical relief from the Tennessee Court of Appeals by filing a petition for review of the Commission's order pursuant to T.C.A. § 4-5-322(b) and seeking a stay of that order pursuant to T.C.A. § 4-5-322(c).[6]

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[5] "Where a case is properly within this category of cases, there is no discretion to grant injunctive relief." *Colorado River v. U.S.*, 424 U.S. 800, 816 n.22, 96 S. Ct. 1236, 1246 n.22, 47 L.Ed. 2d 483. "If the state raises the point and it is found that relief is barred by *Younger*, the federal court must dismiss the action." Wright and Miller, *Federal Practice and Procedure*, § 4252, p. 548. If injunctive relief is barred on *Younger* principles, relief by way of a declaratory judgment is also barred. *Id.*, at p. 547, citing *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed. 2d 688.

[6] The Tennessee Uniform Administrative Procedures Act provides that all appeals of the Commission decisions are heard first by the Middle Section of the Tennessee Court of Appeals. Appeals of decisions by other agencies must be filed in the Davidson County Chancery Court. T.C.A. § 4-5-322(b) (1987 Supplement).

Clearly the state has an important interest in the enforcement of its laws and the regulation of intrastate motor carriers.[7] Similarly, it is not disputed that the plaintiff had an adequate opportunity to raise and litigate its constitutional arguments both before the Commission and in its state court appeal. See *Ohio Civil Rights Commission, supra*, 91 L.Ed. 2d at 522-523; *Blue Cross, supra*, 726 F. 2d at 300 (holding that "clearly Michigan law provides an ample opportunity for Blue Cross to raise its constitutional claims in the same state court proceedings in which the other aspects of the Commissioner's order are challenged."[8]) Federal Express has not attempted to demonstrate "bad faith, harassment or some extraordinary circumstance that would make abstention inappropriate." *Id.*, quoting *Middlesex, supra.*

The abstention issue is not mooted by the fact that Federal Express dismissed its state court appeal before that court could issue a decision on the merits of plaintiff's arguments.[9]

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[7] The state's interest and purpose in regulating intrastate motor carriers is set forth in T.C.A. § 65-15-101. See *McCanless v. Southeastern Greyhound Lines*, 162 S.W. 2d 370 (Tenn. 1942); *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268, 59 S. Ct. 532, 83 L.Ed. 641 (1939). There is apparently no dispute that, but for plaintiff's constitutional arguments, Federal Express is an intrastate motor carrier subject to the Commission's regulatory jurisdiction. Trial Transcript, p.2. See T.C.A. § 65-15-107(a). The willful failure to operate without a certificate of convenience and necessity issued by the Commission is a criminal misdemeanor. T.C.A. § 65-15-322(a).

[8] Tennessee, like Michigan, provides for judicial review of agency decisions and requires that such decisions be reversed if found to be "in violation of constitutional or statutory provisions" or "in excess of the statutory authority of the agency." T.C.A. § 4-5-322(h).

[9] The state court denied plaintiff's motion for a stay on the agency's decision "on condition that compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for

(Footnote 9 continued on next page)

The Supreme Court ruled seven months ago in the *Pennzoil* case that the *Younger* doctrine barred Texaco, the federal plaintiff, from raising in federal court various constitutional claims which the company could have raised in the state courts but had failed to do so. Addressing the procedural status of the parties as it existed on the day when the federal suit was filed, the Court held *Younger* fully applicable even though Texaco apparently late waived the right to litigate its constitutional claims in the state courts. *Pennzoil, supra*, 95 L.Ed. 2d at 19-20. ("Texaco cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner.")

Similarly, the Court held in *Huffman v. Pursue*, 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed. 2d 482, 496 n.22 (1975) that "appellee may not avoid the standards of *Younger* simply by failing to comply with the procedures for perfecting its appeal within the Ohio judicial system," and stated in *Moore v. Sims, supra*, 60 L.Ed. 2d 994, at 1007, "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention."

Relying on *Huffman* and anticipating *Pennzoil*, the Sixth Circuit ruled last year that "the proper time for determining the

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(Footnote 9 continued)

review of said order." Order of the Court of Appeals issued August 6, 1987. As explained to this Court during oral argument (transcript, p. 3), the Commission had ordered Federal Express to make application for a certificate of convenience and necessity but had ruled that the company could continue to operate without a certificate while its application was pending. The Commission then argued successfully to the Court of Appeals that no stay was necessary since the mere filing of an application would not interfere with the operations of Federal Express or prejudice the ongoing appeal of the Commission's order. The state court also presumably considered the relative likelihood of whether Federal Express would prevail on the merits of its claims. Plaintiff filed suit in this Court on August 7, 1987, the day after the stay was denied.

applicability of *Younger* abstention is the time that the federal complaint is filed." *Zalmon, supra*, 802 F. 2d at 204. The *Zalmon* decision also noted, quoting *Huffman*, that "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Id.* at 205 n.7.

Federal Express filed its state court appeal on July 9, 1987. That appeal was dismissed on September 12, 1987. This federal suit was filed on August 7, 1987, and tried on September 10 and 11, 1987. In light of *Pennzoil, Huffman*, and *Zalmon*, the *Younger* doctrine plainly applies to this proceeding despite the decision by Federal Express to dismiss its state court appeal.[10]

The only serious argument against applying *Younger* to this case is that abstention is inappropriate where, as here, the plaintiff alleges that the state proceedings have been preempted by federal law.

Nothing in any of the Supreme Court's line of decisions explaining the *Younger* doctrine indicates that the principles of comity and federalism are inapplicable if a plaintiff raises a preemption claim. Nevertheless, the courts of appeal are split on

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[10] At trial, plaintiff's attorney said that Federal Express withdrew its state appeal because the state court had refused to grant a stay. ("We couldn't get the relief we needed over there." Tr. p. 10) But this Court may not "substitute itself for the State's appellate courts." *Huffman v. Pursue, supra*, 43 L.Ed. 2d at 495. That the state court denied injunctive relief has nothing to do with *Younger*. Plaintiff's remedy, if any, lay in the Tennessee Supreme Court, not here. See *Dermott v. Toyota*, 487 F. Supp. 484, 486 (E.D. Tenn., 1980) in which the plaintiff dismissed his state suit and filed a federal one because the state judge had indicated that the plaintiff's suit had little merit. Accusing the plaintiff of blatant "forum shopping," the federal court dismissed the federal suit, holding, "We are not designed to sit in judgment over state courts, nor to second guess the studied opinions of the state court judges.

the issue, and counsel is aware of no Supreme Court decision directly on point.[11]

Three Circuits have held that *Younger* does not apply where the federal plaintiff alleges that state proceedings have been preempted by federal law. See *Baggett v. Dept. of Professional Regulation*, 717 F.2d 521 (11th Cir., 1983) (*Younger* inapplicable where "preemption is readily apparent" but federal question is one of preemption, abstention under the principle of *Younger v. Harris* is never appropriate"); *Middle South v. Arkansas Public Service Commission*, 772 F. 2d 404, 417 (9th Cir., 1985) (relying on *Baggett, supra*, and a Ninth Circuit decision, *Champion International v. Brown*, 713 F. 2d 1406 (1984)[12]); *Kentucky West Virginia Gas Company v. Penn. Public Utility Commission*, 791 F 2d 1111 (3rd Cir., 1986) (relying on *Baggett, Middle South*, and *Champion* but cautioning that *Younger* may sometimes be appropriate despite a preemption issue).

On the other hand, the Fourth, Fifth, and Sixth Circuits have ruled that, for *Younger* purposes, a preemption claim is no different than any other constitutional argument. See *New Orleans Public Service Comm. v. City of New Orleans*, 798 F.2d 858 (5th Cir. 1986) (a lengthy discussion of abstention under both *Younger* and *Burford* which holds that both apply to preemption claims); *Potomac Electric Power Co. v. Sachs*, 802 F.2d 1527, 1531, n.7) (4th Cir. 1986) ("It would strike us as anomalous to hold that a state court may decide federal constitutional issues but is unqualified or inhibited from deciding preemption issues.");

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[11] In *Brown v. Hotel Employees*, 468 U.S. 491, 104 S. Ct. 3179, 82 L.Ed. 373 (1984), the Court implied that *Younger* abstention would be applicable to a preemption claim but was not determinative in that case because the State had waived the *Younger* defense. 82 L.Ed. 2d at p. 382 n.9.

[12] The rule in the Ninth Circuit has apparently now changed. See *Martori Bros. Distributors v. James Massengale*, 781 F.2d 1349 (1986) and *United States v. State of California*, 639 F. Supp. 199, 204-207 (E.D. Cal., 1986).

American Electric Power Company v. Kentucky Public Service Commission, 787 F. 2d 588 (table) (6th Cir., 1986) (holding that *Younger*, but not *Burford*, applies to a preemption claim.)

The Sixth Circuit's unpublished decision in *American Electric Power* is based on legal and factual circumstances virtually identical to the case at bar. The plaintiff, and electric utility, litigated and lost a rate issue in proceedings before the Kentucky Public Service Commission. Claiming that the Commission authority on that issue had been preempted by the Federal Power Act, the utility filed a federal lawsuit raising the preemption argument and, a few days later, also filed an appeal of the Commission's decision in the Kentucky state courts. In a *per curiam* opinion, the Court ruled that *Younger*, but not *Burford*, compelled the federal courts to dismiss the federal suit. The Court said there was "little question" that the regulation of electric rates was an important state interest or that state appellate remedies provided the utility an adequate opportunity to raise its Constitutional challenges. (In concurring opinions, one judge concluded that both *Burford* and *Younger* applied. The other judge held that *Younger* did not apply because the utility was a plaintiff, not a defendant, in the state court appeal but that *Burford* compelled abstention in any event.)

The *American Electric* decision, although unpublished, appears controlling in the instant proceedings. There is certainly no good reason to distinguish, for *Younger* purposes, a preemption claim from other, equally important, constitutional concerns. Especially, as here, where Federal Express fully litigated the preemption issue before the Commission without questioning at any time the agency's competence or authority to issue a binding decision on that question[13] and where Federal Express similarly

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[13] In Tennessee, administrative agencies have the authority to consider constitutional questions in making determinations on matters under their

(Footnote 13 continued on next page)

raised its preemption claims before the Tennessee Court of Appeals but dismissed the appeal simply because the Court refused to grant a stay, the plaintiff should not be heard to argue that the state agency or the state courts are not fully competent to rule on the preemption issue.[14]

There is no satisfactory explanation to harmonize the inconsistent holdings of the various courts of appeal. Perhaps one could say, as the panel did in *Baggett*, that federal courts should abstain except where preemption "is readily apparent."

A somewhat better approach is suggested by the Second Circuit's recent decision in *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 223 n.4 (1987) a case involving federal preemption under the National Labor Relations Act. That circuit held that abstention "is not usually applied in a preemption case" but explained in *Christ the King* that "the underlying rationale of this doctrine is that it would be futile to abstain in deference to a state decisional body if it should later develop that it may not have jurisdiction over a dispute due to the preemptive jurisdiction of a federal body" such as the National Labor Relations Board. After finding that the state labor relations board had not been preempted by the NLRB, the Court went on to hold that *Younger* required the district court to abstain from adjudicating plaintiff's constitutional claims which were then pending before

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jurisdiction. *Crawford v. Consolidated Retirement System*, 732 S. W. 2d 293, 297 (Tenn. App. 1987) *cert. denied* by Supreme Court on June 22, 1987. See *Ohio Civil Rights commission, supra*, 91 L.Ed. 2d at 523 (noting that "it would seem unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in light of federal constitutional principles.")

[14] The factual situation here distinguishes this case from *Baggett, supra*, and *Kentucky West Virginia, supra*, in which the federal plaintiffs apparently never litigated their preemption claims in any state administrative or judicial forum.

the state agency. In other words, the rule in the Second Circuit is tht[sic] *Younger* abstention is inapplicable only if, as in the area of labor relations or bankruptcy, Congress has declared that federal courts or agencies have exclusive subject matter jurisdiction and the states have no authority to act. That, of course, is not the issue here. As discussed further in the next section, it cannot seriously be doubted that both the state and federal courts have concurrent, subject matter jurisdiction over the preemption and Commerce Clause issues not before this Court.[15]

II. *Res Judicata*

Purolator Courier, an intervening defendant in this case, has filed an extensive brief on the *res judicata* effect on the Commission's judgment. Counsel for the Commission supports Purolator's arguments and will not repeat them here. Suffice it to say that it is well settled that "this court must afford the same *res judicata* effect to that judgment as would the Tennessee courts." *Whitfield v. City of Knoxville*, 756 F. 2d 455 (6th Cir. 1985); *Tucker v. Callahan*, 663 F. Supp. 375 (M.D. Tenn. 1987). It is equally clear that under Tennessee law, the principles of *res judicata* apply to a final decision of a state administrative agency (*Fourakre v. Perry*, 667 S.W. 2d 483 (Tenn. App. 1983) *cert. denied* on March 19, 1984) and that a state agency has the authority "to consider a constitutional question in making determinations of matters committed to it by law."[16] *Crawford v. Consolidated Retirement System, supra*, 732 S.W. 2d at 297. That an unappealed agency decision on an issue of federal or constitutional law may bind the parties in a subsequent federal court action is hardly a recent or novel legal principle. *Tipler v.*

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[15] It has been established for at least a century that "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional circumstances where the jurisdiction has been restricted by Congress to the federal courts." *Grubb v. Public Service Commission*, 281 U.S. 470, 74 L.Ed. 972, 978 (1930).

E.I. DuPont, 443 F. 2d 125, 128 (6th Cir. 1971), ("It is now accepted that both *res judicata* and collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity."); *Mumford Cove Association v. Town of Groton*, 786 F. 2d 530, 535 (2nd Cir. 1986), (holding that the state agency's unappealed decision on an issue of federal law was *res judicata* and that the federal plaintiffs could not "bootstrap" themselves into court by failing to seek state court review and then "be allowed to argue that the Administrative Order is subject to challenge in federal court when such an attack otherwise has been precluded.") Davis, *Administrative Law Treatise*, Vol. 4 § 21:2 and § 21:3 (1983); Wright and Miller, *Federal Practice and Procedure*, Vol. 18, § 4475 (1981).

To escape the preclusive effect of the Commission's final order, Federal Express makes the remarkable argument that neither the Commission nor the Tennessee courts have subject matter jurisdiction to decide whether or not Federal Express is subject to state regulation and therefore any state ruling on that

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[16] The Tennessee Commission has jurisdiction under state law to enforce and interpret the state's motor carrier act (T.C.A. § 65-15-101, *et seq.*); and, as in the case at bar, the agency occasionally must apply the Act in light of federal statutory and constitutional principles. See n.19, *infra.*, and n.13 *supra.*

Thus, this case differs from the situation in *University of Tennessee v. Elliott*, 478 U.S. __, 106 S.Ct. __, 92 L.Ed. 635 (1986) in which the state administrative law judge made factual findings but "held that he lacked jurisdiction to adjudicate respondent's federal civil rights claims." 92 L.Ed. at 641. See also *Loudermill v. Cleveland Board of Education*, 721 F. 2d 550 (6th Cir. 1983) in which the Court did not give preclusive effect to the unappealed decision of a state agency because, under state law, "the administrative agency clearly lacked the power to grant the procedural due process claim" raised by the federal plaintiff. 721 F. 2d at 559 n.13.

issue is subject to collateral attack in federal court.[17] No authority is cited for this proposition except cases such as *Kalb v. Feurstein*, 84 L.Ed. 376 (1940) and *Capital Service, Inc. v. NLRB*, 98 L.Ed. 887 (1953) which involve those "exceptional circumstances" where Congress has vested exclusive jurisdiction over certain subjects, such as bankruptcy and labor relations, in the federal courts.[18]

That a mere claim of federal preemption vests this court with exclusive subject matter jurisdiction over this lawsuit is preposterous. See *Grubbs v. Public Service Commission*, discussed *supra* at n.15. Tennessee courts routinely issue opinions deciding whether state law has been preempted by a federal statute.[19]

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[17] This argument by Federal Express is undercut by the discussion in the later part of its brief which recognizes that a ruling by a court or administrative agency may have preclusive effect even if the tribunal lacks subject matter jurisdiction. As explained in the *Restatement of Judgments*, § 12 (1983), a ruling on subject matter jurisdiction is considered *res judicata* if the issue was fully litigated in a judicial or quasi judicial forum. The procedures and competence of the Tennessee Commission is discussed in the brief filed by Purolator Courier.

[18] As the Supreme Court explained last year, the holding in *Kalb* "was based on Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw that jurisdiction from all other forums." Decisions interpreting the National Labor Relations Act were also based on the Court's conclusion that Congress "has vested in the National Labor Relations Board the exclusive jurisdiction over the administration of those laws." *International Longshoreman's Association v. Davis*, 476 U.S. __, 90 L.Ed. 2d 389, 402 n.11 (1986); See Wright and Miller, *supra*, §§ 4428 and 4429.

[19] Several cases specifically concerned the jurisdiction of the Tennessee Public Service Commission. See, for example, *Illinois Central Gulf Railroad Company v. Tennessee Public Service Commission*, 736 S.W. 2d 112 (Tenn. App. 1987), *cert denied* by Supreme Court on August 31, 1987 (affirming agency's decision that the P.S.C. was not preempted by the Federal Railroad

(Footnote 19 continued on next page)

Certainly nothing in the Federal Aviation Act indicates that the enforcement and interpretation of its provisions is the exclusive prerogative of the federal courts. See *New York Airlines v. Dukes County*, 623 F. Supp. 1435, 1448-1450 (D.C. Mass. 1985) (holding that the preemption section relied upon by Federal Express, 49 U.S.C. § 1305(a), does not create a federal cause of action).

The Sixth Circuit, moreover, has specifically declared that a claim of federal preemption "is not relevant to the determination of whether the district court had subject matter jurisdiction." *Michigan Savings and Loan League v. Francis*, 683 F. 2d 957, 960 (6th Cir. 1982).[20] In other words, plaintiff's preemption

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(Footnote 19 continued0

Safety Act from regulating track walkways); *Tennessee Public Service Commission v. Nashville Gas Company*, 551 S.W. 2d 315 (Tenn.) *cert. denied*, 54 L.Ed. 2d 191 (1977) (affirming Commission's decision that the agency had not been preempted by the federal Natural Gas Act from regulating the sale of gas by an interstate pipeline to an industrial user in Tennessee); *McCanless v. Southeastern Greyhound Lines, supra*, 162 S.W. 2d 370 (Tenn. 1942)(holding that the Tennessee Public Service Commission was not preempted by the Federal Motor Carrier Act or the federal Commerce Clause from regulating the intrastate aspects of interstate bus transportation).

[20] See also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638 (1938). That opinion by Mr. Justice Brandeis involved an interesting factual situation which is the mirror image of the case at bar. A labor union filed a complaint with the National Labor Relations Board concerning the activities of Bethlehem Shipbuilding. Before the matter came to hearing, Bethlehem filed an action in federal district court seeking to enjoin the Board on the grounds that the complaint involved only intrastate activities and was therefore not subject to the Board's jurisdiction. The District Court issued the injunction but the Supreme Court reversed, holding that any such argument about the Board's jurisdiction over intrastate activities must be make[sic] to the Board itself and then, if necessary, to the Circuit Court of Appeals which sits in review of the Board's decisions. Plaintiff's allegation that the Board lacked jurisdiction to hear the complaint did not deprive the agency of its statutory authority to enforce and interpret the National Labor Relations Act.

argument not only falls short of giving this Court exclusive jurisdiction over this suit, it does not, standing alone, give the Court any subject matter jurisdiction at all.[21]

In sum, there is no basis for the argument that this Court has exclusive jurisdiction over this suit or that the Tennessee Commission and state appellate courts have no authority to interpret state law in light of the federal Commerce Clause and the Federal Aviation Act. Certainly Federal Express made no such argument when it litigated this matter before the Commission or when it sought injunctive relief from Tennessee Court of Appeals.

Underlying this claim is the implicit assertion that there is "a universal right to litigate a federal claim in a federal court." *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed. 2d 308, 320 (1980). But as the Court went on to explain, such an argument "is hardly a legal basis at all" but reflects rather "a general distrust of the capacity of state courts to render correct decisions on constitutional issues," a notion which the Court has repeated and emphatically rejected. *Id.*

Of course, this case involves a decision not of a state court, but of an administrative agency which, acting in a judicial capacity and in accordance with state procedural rules, carefully considered and rejected the federal constitutional and statutory claims raised by Federal Express. As discussed in the brief filed by Purolator Courier, there is no question but that Federal Express

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[21] That is not to say that this Court lacks jurisdiction over this suit. In *Michigan Savings* the Court of Appeals held that no federal jurisdiction exists where federal preemption is raised as a defense to a "threatened" state action. 683 F.2d at 962. Here, the state action is not threatened; it has already occurred so that the issue is ripe for decision. *Michigan Savings* is applicable here to show that a preemption claim, standing alone, does not grant the federal court subject matter jurisdiction, much less the exclusive right to decide the preemption issue.

fully litigated its claims, first before a state administrative law judge and again before the Commission itself.[22] There is no reason to believe that the agency's decision would not be considered conclusive on the jurisdiction issue in subsequent state proceedings involving the regulation of Federal Express and therefore no reason why this Court should not give the same preclusive effect to the agency's order.

Respectfully submitted,

/s/ Henry Walker
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Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
615/741-3191

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[22] "We have no hesitation in concluding that this panoply of procedures complemented by administrative as well as judicial review, is sufficient under the Due Process Clause" for the purpose of giving *res judicata* effect to a state agency's decision which was subsequently affirmed by the state court on appeal. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262, 282 (1982).

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing brief has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this 12th day of November, 1987.

/s/ Henry Walker
Attorney for Defendants

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5129

AMERICAN ELECTRIC POWER COMPANY, INC.; KENTUCKY POWER COMPANY; APPALACHIAN POWER COMPANY COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY; INDIANA AND MICHIGAN ELECTRIC COMPANY; OHIO POWER COMPANY AND AEP GENERATING COMPANY,

Plaintiffs-Appellants,

v.

KENTUCKY PUBLIC SERVICE COMMISSION; RICHARD D. HEMAN, CHAIRMAN OF THE KY PUBLIC SERVICE COMMISSION; LAURA MURRELL, MEMBER OF THE KY PUBLIC COMMISSION; AND RUSH DOZIER, MEMBER OF THE KY PUBLIC SERVICE COMMISSION,

Defendants-Appellees,

AIR PRODUCTS AND CHEMICALS, INC., ARMCO, INC., ET AL, ATTORNEY GENERAL OF KENTUCKY, CONSUMER PROTECTION DIVISION, CONCERNED CITIZENS OF MARTIN COUNTY, INC., JOHN HENRY WARD, BERT DIAMOND AND SALLY CRUM,

Intervenors-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY

(Filed: March 24, 1986)

BEFORE: JONES and CONTIE, Circuit Judges; and DEMASCIO, District Judge.*

Per Curiam. This case raises the question whether it is proper for a federal court to dismiss on abstention grounds a challenge to a state public utility commission rate order brought by a utility alleging federal law claims, when the utility has simultaneously brought an attack on the same order raising the same claims in state court. The court below elected to dismiss citing both the *Younger* and *Buford* abstention doctrines. *See Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil*, 319 U.S. 315 (1943). We hold that *Burford* abstention is inappropriate in this circumstance but that *Younger* abstention is permissible and, accordingly, affirm.

I.

The primary controversy raised in the complaint involves the source from which an electric company will be permitted to purchase wholesale electricity and pass along the cost of that purchase to its customers through retail rates.[1] Plaintiffs-appellants are American Electric Power Company, Inc. ("AEP"), a multi-state holding company of electric power utilities, and its subsidiaries. Kentucky Power Company ("KPC"), one of AEP's subsidiaries, provides electricity to retail customers in Kentucky. KPC is party to an Interconnection Agreement among AEP affiliates. This agreement creates a pool of electricity and permits an Agreement member to draw from this pool when its own power needs exceed capacity. KPC had, for some time, been drawing heavily from this pool. According to KPC, it was therefore obliged by the Interconnection Agreement to find a new source of wholesale electricity. Consequently, in 1984, KPC entered into a second agreement (the "Unit Power Agree-

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* Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

ment) with two AEP subsidiaries under which KPC was permitted to purchase 15% of the output from a new generating plant being built in Rockport, Indiana.[1]

Since the Unit Power Agreement was interstate in nature it was submitted to the Federal Energy Regulatory Commission (FERC) which accepted it as a rate schedule. FERC is empowered by the Federal Power Act, 16 U.S.C. § 791 *et. seq.* (1982), to determine the justness and reasonableness of interstate power transmission rates between utilities. The Unit Power Agreement was also submitted to the Kentucky Public Service Commission, the body which reviews Kentucky intrastate electric rates. The Kentucky Commission construed the Interconnection Agreement as permitting KPC to obtain all of its power needs from the pool without resort to the Unit Power Agreement. Since power under the new agreement would cost KPC more that three times that from the pool, the Kentucky Commission ruled that the purchases from the Unit Power Agreement would be imprudent and refused to approve the retail rate increase needed to pass on the higher costs.

In reviewing the fairness of intrastate retail rates, a state commission is bound to accept a FERC determination of the reasonableness of wholesale source rates. *Narragansett Electric Co. v. Burke,* 381 A.2d 1358 (R,I, 1977), *cert. denied,* 435 U.S. 972 (1978). AEP and KPC argue that by not approving the higher retail rates the Kentucky Commission has illegally displaced or ignored the FERC approved Unit Power AGreement in violation of the Federal Power Act and the Supremacy Clause. Further, they claim that the Kentucky Commission was not

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[1] AEP raised an additional claim in its complaint which involves reimbursements from AEP subsidiaries to KPC for the cost of construction and maintenance of a extra-high voltage line. The substance of this claim is unclear from the record and, regardless, its discussion would add nothing to the resolution of the issues on appeal.

permitted to construe the Interconnection Agreement because the regulation of interstate transmission is preempted by the Federal Power Act and the agreement, therefore, is subject to the sole jurisdiction of FERC. These are the claims the AEP and KPC had raised in federal court. Shortly after filing this complaint, KPC brought an action in Kentucky state court in which it appealed the Kentucky Commission's order and raised the same issues presented here. That action is still pending. When the federal court below elected to abstain in favor of the state action and dismissed the case, the plaintiffs appealed.

II.

Abstention from the exercise of legitimate federal jurisdiction should be the exception, not the rule. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976); *Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897, 901 (6th Cir. 1983). "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813 (*quoting County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)). It is upon this background that we consider whether abstention was proper in this case. Our review of the trial court's decision to abstain is *de novo*. *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985).

A.

AEP argues that the court's reliance on *Burford* abstention in dismissing this case was inappropriate. We agree. Abstention was called for in *Burford v. Sun Oil*, 319 U.S. 315 (1943), because the federal court had been asked to review the reasonableness of a Texas Railroad Commission order, a question of state law which implicated the state's ability to develop a comprehensive policy regarding the placement of oil wells. Id. at 320-

22; *Colorado River*, 424 U.S. at 814-15. The need for consistent and informed decisions in this area was evidenced by the state's assignment of the review of these decisions to one state court. *Burford*, 315 U.S. at 325. Under these circumstances, review of the state law question by the federal court risked upsetting the delicate balance among oil producers that the state was attempting to establish in the harvesting of its oil deposits. *See id.* at 327.

Similarly, in *Ada-Cascade*, this court employed *Burford* abstention when it had been asked to determine "whether [a proposed waste] facility had obtained all the necessary state and local permits" to continue construction, an issue which required the interpretation of state acts and rules established as part of a complex system of environmental regulation. 720 F.2d at 901, 905.

By contrast, the court here is not asked to review the validity under state law of the Kentucky Commission order. Nor is the court asked to decide local issues. Rather, AEP claims that the Commission is prohibited from making the order as a matter of federal law. Although we recognize the presence here of a regulatory scheme with consolidated state review, a decision on the grounds raised here will not present the same risk of disruption that was present in *Burford*.

The court below relied primarily upon the Fourth Circuit decision in *Aluminum Co. of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), where the court of appeals applied *Burford* to abstain from deciding Alcoa's claim that a commission order interfered with a preemptive federal regulatory scheme and burdened interstate commerce. *Id.* at 1025. Despite the similarity to this case, we decline to follow the *Alcoa* decision. The court there failed to recognize that *Burford* operates only to prevent federal determination of *state* law. Rather, the court abstained because the claim attacked a state order and the determination of the federal issue raised

would cause "needless obstruction of North Carolina's domestic policy." *Id.* at 1029. This is an overly broad application of the doctrine. The Supreme Court has refused to employ *Burford* in a similar context noting that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n.5 (1978).

We hold that *Burford* abstention was improperly applied to this action where no questions of state law that implicate a complex state policy scheme are present.

B.

The doctrine developed in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny espouses "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Abstention under *Younger* can be appropriate in civil cases where the state is a party as well as criminal cases when an ongoing state judicial proceeding implicates important state interests and provides an adequate opportunity to raise constitutional challenges. Id. at 432. When this is the case, the federal court should, absent bad faith, harassment or a patently invalid state statute, defer to certain state proceedings to consider the federal claims in the first instance. *See Colorado River*, 424 U.S. at 816.

There is little question here that the regulation of consumer electric rates is an important state interest or that KPC could raise its constitutional challenges to the Commission order in its state action. However, applying *Younger* here would be unusual in that the federal plaintiff is also, procedurally, a plaintiff in the pending state action. The typical *Younger* case involves a defendant to state initiated proceedings who prefers to raise his federal claims as a plaintiff in federal court than as a defense to

the state court action. *Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 30 (6th Cir. 1984). In *Crawley* state prisoners brought actions to challenge the conditions of their confinement in both state and federal court. This court refused to apply *Younger* abstention precisely because the federal plaintiffs were also the state plaintiffs. Id.

Formal denominations of plaintiff and defendant should not be applied mechanically, however. In *Blue Cross & Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 299 (6th Cir. 1984), this court abstained under *Younger* where an insurance company raised constitutional challenges to a rate order both by bringing an action in federal court and by seeking review of the order in state court. The posture of *Blue Cross* was significantly different than that in *Crawley*. The state proceedings in *Crawley* began with a state court complaint filed by the federal plaintiff. In *Blue Cross*, and in this case, the proceedings began at the regulatory level and the subsequent court action was no more than an appeal of a state order entered against the party who appeals. *See Blue Cross*, 726 F.2d at 299. The process here was begun by the state in asserting its power to regulate intrastate commerce. When the regulatory activities of the state proceed to a state judicial forum, the principles of comity and federalism that underlie the *Younger* doctrine come into play and the federal courts should abstain from interfering.

AEP does not deny that they will have an adequate opportunity to raise their federal claims in the pending state action, nor do they claim that the Kentucky Commission's orders are the result of bad faith or harassment. *See Middlesex County*, 457 U.S. at 437. Consequently we hold that the district court properly dismissed the complaint. The judgment of the court below is AFFIRMED.

CONTIE, Circuit Judge, concurring. I concur in the result and in the reasoning of the Court except for the holding that the district court improperly relied on *Burford* abstention in dismissing this case. I would hold that *Burford* abstention applies.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that a district court should have abstained when presented with a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells. Abstention was appropriate because "review of reasonableness by the federal courts . . . where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815 (1976). Accordingly, even though review of a state law question was at issue in *Burford*, the Court focused on the disruption of a state policy in applying abstention.

This Court addressed and applied Burford abstention in *Ada-Cascade Watch Co. v. Cascade Resource Recovery*, 720 F.2d 897 (6th Cir. 1983), where we found that the Supreme Court had established two factors which justify *Burford* abstention. "First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and secondly, the existence of a state-created forum with specialized competence in the particular area." *Id.* at 903.

The district court below found that the considerations highlighted in Ada-Cascade existed in the present case. The court initially observed that the first factor was satisfied since Kentucky "has an overriding interest in regulating the retail rates charged by public utilities." The court explained that the fixing of intrastate electricity rates by the Kentucky Commission undoubtedly involved fundamental state policy considerations. Also, the court noted that the rates are set by the Kentucky

Commission "in accordance with statutory procedures enacted for their formulation and execution." The court further found that the second consideration was present since the orders of the Kentucky Commission are appealed to a "designated state-created forum with special expertise in the public utility regulation field." Exclusive judicial review is provided in the Franklin County Circuit Court by K.R.S. 278.410(1).[1] Finding the factors listed in *Ada-Cascade* to be present, the district court held that abstention under *Burford* was required.

The district court's holding is consistent with the Fourth Circuit decision in *Aluminum Company of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), a case which was relied upon by the district court. The appeal in *Alcoa* involved an action which had been brought in federal court by a utility company and its parent, seeking to enjoin the enforcement of a rate order issued by the state utilities commission which allegedly interfered with the FERC's regulatory scheme. State court proceedings involving, among other issues, the same federal claims raised in the federal action were pending at the time of appeal. The Fourth Circuit held:

> We believe that the present case involves the quintessential *Buford* setting of a complex state regulatory scheme con-

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[1] The statute provides in pertinent part:

> Any party to a commission proceeding or any utility affected by an order of the Commission may, within twenty (20) days after being served with the order, or within twenty (20) days after its application for rehearing has been denied by failure of the Commission to act, or within twenty (20) days after being served with the final order on rehearing, when a rehearing has been granted, bring an action against the Commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Notice of the institution of such action shall be given to all parties of record before the Commission.

K.R.S. 278.410(1)(1981).

> cerning important facts of state policies for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded. The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold relief so as to avoid needless obstruction of [the state's] domestic policy.

Id. at 1029.

The present case is factually indistinguishable from *Alcoa*. I would accordingly follow that Court's analysis in this case and find that the present appeal "involves the quintessential *Burford* setting." Also, the conditions stated in *Ada-Cascade* are met in this case. First, there is a complex state regulatory scheme involving important state policies and second, Kentucky has provided a specialized forum to review challenges such as the one presented on appeal. Based on this court's prior discussion of *Burford* abstention and the holding of the *Alcoa* case, I would affirm the district court's application of *Burford* abstention.

DeMASCIO, District Judge, concurring. While I agree that the district court properly dismissed plaintiff's complaint, I reach that conclusion for the opposite reasons suggested in the per curiam opinion. I am convinced that the proper basis for abstention is *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and not *Younger v. Harris*, 401 U.S. 37 (1971).

In *Crawley v. Hamilton County Commissioner*, 744 F.2d 28 (6th Cir. 1984), this court circumscribed the application of the *Younger* doctrine. There, the district court dismissed, on *Younger* grounds, a § 1983 action brought by a group of jail inmates challenging the conditions of their confinement. The plaintiffs were contemporaneously pursuing a state court action on the same grounds. The circuit reversed, holding the *Younger* doctrine inapplicable in this procedural context:

> *Younger* and its progeny all have a procedural posture which is very different from our case. In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally available to the would-be federal plaintiff as a defense in the state proceedings. In our case, the federal plaintiffs are also *plaintiffs* in the state court action. In addition, the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.

Id. at 30 (citations omitted).

Noting that the Kentucky Power Company appealed the Kentucky Public Service Commission's December 4, 1984 order in state court, the lower court held that the *Younger* doctrine, made applicable to civil actions by virtue of *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982), made federal abstention proper. I disagree. The

procedural posture of this case does not fit the *Younger* mold. Appellants are not attempting to enjoin state court proceedings against them, but rather they are state court plaintiffs. Further, appellants are not defensively asserting federal claims in the state court action. Therefore, the district court should not have abstained on the basis of the *Younger* doctrine and the per curiam opinion improperly affirms on that basis.

But, under the *Burford* doctrine, abstention is appropriate where federal review of a state law question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See Ada-Cascade Watch Co. v. Cascade Resource Recovery*, 720 F.2d 897, 903 (6th Cir. 1983).

The prerequisites for the application of *Burford* are: (a) the presence of a complex state regulatory scheme that would be disrupted by federal court review and (b) the existence of a state-created forum with specialized competence in the particular area. In *Alcoa v. Utilities Comm'n of N. Carolina*, 713 F.2d 1024 (4th Cir. 1983), the Fourth Circuit, faced with similar facts, concluded that *Burford* abstention was appropriate. The court held that the state commission's ratemaking "involved important and basic consideration of state policy and was accomplished in accordance with the uniform statutory procedures for the formation of that policy." *Id.* at 1029.

In holding the *Burford* abstention appropriate, the district court stated:

> The Commonwealth of Kentucky clearly has an overriding interest in regulating the retail rates charged by public utilities. The Kentucky Public Service Commission orders outline the retail, intrastate rates to be charged to Kentucky electric power consumers. The setting of these rates undoubtedly involve fundamental state policy considerations and are accomplished in accordance with statutory procedures enacted for their formulation and execution. These

> orders are being appealed by Kentucky Power Company to a designated state-created forum with special expertise in the public utility regulation field; to wit, the Frankling[sic] County Circuit Court. Kentucky Power Company has raised both state and federal legal issues in that forum. These federal issues are the same ones the American Electric Power Co. affiliates wish this court to consider.

I agree that abstention on *Burford* grounds is appropriate in this case. The State of Kentucky certainly has a legitimate interest in the regulation of the retail rates of its public utilities. In order to effectively protect that interest the state regulatory commission has the power to scrutinize expenditures and costs that have been imprudently incurred by a utility when other less expensive means are available for the same purpose. Moreover, an extensive state appellate system exists whereby utilities can seek review of the commission's orders. Not only does such a system exist, but appellants are taking advantage of that system while, at the same time, pursuing this action.

The district court's ruling should be affirmed because abstention based on *Burford* was proper.

SUPPLEMENTAL APPENDIX L

APPEAL BY PERMISSION
FROM APPELLATE COURT TO SUPREME COURT:

RE: TIME

JUDGMENT ENTERED ON THIS
DATE: JULY 08, 1988

Application for permission to appeal shall be filed with the Clerk of the Supreme Court WITHIN THIRTY (30) DAYS after the date of entry of the judgment of the Court of Appeals or Court of Criminal Appeals [Rule 11 (b) Tennessee Rules of Appellate Procedure].

STATE BOARD OF EQUALIZATION,
EXECUTIVE BOARD OF THE
TENNESSEE BAPTIST CONVENTION,
CUMBERLAND PRESBYTERIAN CHURCH,
HOLSTON CONFERENCE OF THE
UNITED METHODIST CHURCH, THE TENNESSEE CONFERENCE OF THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH, DIOCESE OF WEST TENNESSEE, DIOCESE OF EAST TENNESSEE, NATIONAL BAPTIST CONVENTION, U.S.A., CATHOLIC DIOCESE OF WEST TENNESSEE, CATHOLIC DIOCESE OF MIDDLE TENNESSEE,
DEFENDANTS / APPELLEES

APPEALED FROM THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

HONORABLE C. ALLEN HIGH, CHANCELLOR

OPINION RELEASED JULY 08, 1988

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AFFIRMED

LLOYD TATUM
SPECIAL JUDGE

OPINION

This case involves an attack by the Metropolitan Government of Nashville and Davidson County on the constitutionality of T.C.A. § 67-5-212(a)(1) which allows exemption from property taxation of one parsonage owned by a church or religious institution.

The Metropolitan government filed a petition with the State Board of Equalization relying upon the provisions of T.C.A. § 4-5-223. The petition sought a declaratory order by the State Board of Equalization declaring the aforesaid statutory provisions, exempting one parsonage per church from property tax, to be unconstitutional as in violation of Article II, § 28 of the Tennessee Constitution. The matter was contested by various churches.

An Administrative Law Judge of the State Board of Equalization held that § 67-5-212(a)(1) was unconstitutional to the extent that it required a per se exemption of parsonages. Appeal was taken by the intervening church groups to the Assessment Appeals Commission which reversed the order of the Administrative Law Judge, holding that parsonages were used for religious purposes as defined by Article II, Section 28 of the Tennessee Constitution. The Metropolitan government appealed to the State Board of Equalization where the judgment of the Assessment Appeals Commission was affirmed.

The Metropolitan Government of Nashville and Davidson County filed a petition for review in the Chancery Court of Davidson County pursuant to T.C.A. § 4-5-322. The Bishop of the Roman Catholic Diocese of Memphis and the other defendant churches filed a motion to dismiss. The Chancellor granted the motion to dismiss, holding that the administrative agency did not have jurisdiction to determine the constitutionality of the statute.

The Metropolitan government and the State Board of Equalization appealed to this court. Two issues are presented: (1) whether the Metropolitan Government of Nashville and Davidson County followed the statutory requirements of exhausting administrative remedies in pursuing this issue; and (2) whether administrative agencies have jurisdiction to determine the constitutionality of a statute pursuant to T.C.A. § 4-5-223. After considering the record, several briefs filed by the parties and argument of counsel, we conclude that the judgment of the Chancellor must be affirmed.

We first address the question as to whether the State Board of Equalization had jurisdiction to determine the constitutionality of a State statute. The appellants, Metropolitan Government of Nashville and Davidson County and the State Board of Equalization, insist that the State Board had this authority pursuant to T.C.A. § 4-5-223, which provides, in part, as follows:

> " 4-5-223. Declaratory orders.—(a) Any affected person may petition an agency for a declaratory order as to the *validity* or applicability of a statute, rule, or order within the primary jurisdiction of the agency." (Emphasis supplied)

The appellants argue that the above provision of the Uniform Administrative Procedures Act, authorizing the administrative agency to promulgate a declaratory order as to the "validity" of a statute, bestows upon the agency jurisdiction to determine the constitutionality of a statute. The appellants reason that if a statute is unconstitutional, then it is "invalid."

The general rule is stated in 73 C.J.S., *Public Administrative Law and Procedure*, § 65, at page 536:

> " In general, administrative officers and agencies may not determine constitutional questions. Accordingly, they have no power of authority to consider or question the constitutionality of an act of the legislature, such as their own

> enabling legislation, and may not declare unconstitutional the statutes which they are empowered to administer or enforce."

In 1 Am. Jur. 2d, *Administrative Law*, § 185, at pages 989-90, it is stated, "It is universally recognized that administrative agencies, as such, do not determine constitutional issues."

In *Goodwin v. Metropolitan Board of Health*, 656 S.W.2d 383, 387 (Tenn. App. 1983), the Court Stated:

> "Of course, a non-judicial board has no power or authority to make constitutional rulings."

This statement from the *Goodwin* case, was construed in *Crawford v. Tennessee Consolidated Retirement System*, 732 S.W.2d 293, 297 (Tenn. App. 1987), to mean "that only a court may pronounce a declaratory judgment on the subject of constitutionality of a law, regulation or action."

In the unreported opinion of this court in the case of *Billy R. Draughon v. Joel Plummer, Commissioner of Safety* (filed at Nashville on November 21, 1984), there was under review a proceeding that originated under the Uniform Administrative Procedures Act, wherein Mr. Draughon's driver's license was suspended by a hearing officer of the Department of Safety pursuant to the "implied consent" law. See T.C.A. § 55-10-406. Mr. Draughon filed a petition pursuant to T.C.A. § 4-5-322 seeking a judicial review of this decision by the Chancery Court. The Chancery Court declined to consider constitutional arguments raised by Mr. Draughon in that court because the issues had not been raised before the administrative agency. This court, in holding that it was not necessary or appropriate to raise constitutional issues before the administrative agency in order to preserve them for judicial review, stated:

"In our opinion, the trial court erred by declining to consider the constitutional arguments raised by Mr. Draughon. While we have already found that the Tennessee Rules of Appellate Procedure do not apply to petitions for review filed in the Chancery Court for Davidson County pursuant to Tenn. Code Ann. § 4-5-322, there are two more important reasons why a litigant in a contested case hearing should not be required to raise constitutional issues before the administrative agency in order to be able to raise these issues before the reviewing court.

First, administrative agencies are ill equipped to hear and decide issues concerning the constitutionality of the legislation empowering them to act or of the procedures they have adopted to conduct their business. In these instances, they lack the proper expertise and impartiality to decide these questions. By attempting to do so, they would invade the province of the Judiciary. *LaFever v. Ware*, 211 Tenn. 393, 400, 365 S.W.2d 44, 47 (1963); *Peay v. Nolan*, 157 Tenn. 222, 229, 7 S.W.2d 815, 816 (1928); and *Goodwin v. Metropolitan Board of Health*, 656 S.W.2d 383, 387 (Tenn. App. 1983). See also 73 C.J.S., *Public Administrative Law and Procedure*, §§ 42 & 65 (1983) and 1 Am.Jur.2d *Administrative Law*, § 185 (1962).

Second, the Tennessee Supreme Court has stated that a constitutional question can be raised at any time. *Veach v. State*, 491 S.W.2d 81, 83 (Tenn. 1973). While the Court recently narrowed this holding by ruling that a constitutional attack upon the validity of a statute should not be considered for the first time on appeal unless the statute is obviously unconstitutional, we do not construe this decision to apply to cases involving petitions for review pursuant to Tenn. Code Ann. § 4-5-322.

Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983) dealt with a civil action filed by a woman and her two minor children against a veterinarian who threatened to turn their dog over to an animal shelter as permitted by Tenn. Code Ann. § 63-12-134 if his bill was not paid. The trial court granted a summary judgment in favor of the veterinarian. The mother and children appealed to this Court and for the first time asserted that Tenn. Code Ann. § 63-12-134 was unconstitutional. This Court considered this constitutional question on appeal even though it had not been raised in the trial court. The Tennessee Supreme Court determined that we should not have reached this issue because it had not been raised in the trial court. The Tennessee Supreme Court determined that we should not have reached this issue because it had not been raised in the trial court. *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1968).

There are significant procedural and substantive differences between petitions to review decisions of administrative agencies filed in the trial court pursuant to Tenn. Code Ann. § 4-5-322 and appeals from decisions of lower courts lodged in the Court of Appeals. For the purpose of this question, however, only one jurisdictional difference need be discussed.

Unlike administrative agencies, trial courts have the jurisdiction to hear and decide constitutional questions. It is this difference that renders the holding in *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983) inapplicable in this case. While a litigant's failure to present a constitutional question to a trial court having the jurisdiction to decide it should prevent him from raising the same issue for the first time on appeal, a litigant's failure to call upon an administrative agency to decide a constitutional question should not have the same consequences. To require parties to present constitutional questions to administrative agencies

> who do not have the authority to decide them would be an exercise in futility and would not promote judicial economy.
>
> It was not necessary, or even appropriate, for Mr. Draughon to request the Department of Safety's hearing officer to decide the constitutional issues he asserted later. Thus, we find that Mr. Draughon did not waive his opportunity to challenge the constitutionality of Tennessee's implied consent law of the procedures used by the Department of Safety to enforce it. He raised these issues in a timely manner by including them as part of his petition for review when it was filed in the trial court."

The conclusion that the administrative agencies cannot decide constitutional issues has received wide recognition in the federal courts and the courts of other states, and clearly represents a majority view. *See, e.g., Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board."; *United States v. RCA Alaska Communications, Inc.*, 597 F.2d 489, 507 (Alaska 1978) ("Evaluations of constitutionality and other 'pure' issues of law are within the special expertise of the courts rather than the [administrative] agency.");*Carrollwood State Bank v. Lewis*, 362 So.2d 110, 113-14 (Fla. App. 1978) ("administrative process cannot resolve a constitutional attack upon a statute"); *Flint River Mills v. Henry*, 216 S.E.2d 895, 896-97 (Ga. 1975), *appeal dismissed*, 434 U.S. 1-03 (1978) ("an administrative hearing officer or board . . . is powerless to declare the Act unconstitutional"); *City of Joplin v. Industrial Comm'n of Missouri*, 329 S.W.2d 687, 689 (Mo. 1959) ("administrative agencies do not have authority to determine constitutionality of legislation"); *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 585 (N.D. 1984) ("To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made."); *Belco Petro-*

leum Corp. v. State Board of Equalization, 587 P.2d 204, 214 (Wyo. 1978) ("We hold that an administrative agency has no power to determine the constitutionality of a statute.").

To hold that the Legislature intended by use of the word "validity" in T.C.A. § 4-5-223 to vest jurisdiction in an administrative agency to determine the constitutionality of statutes, would be to declare that the Legislative Branch of government attempted to empower the Executive Branch to nullify as unconstitutional a Legislative enactment. It was conceded at oral argument that the State Board of Equalization is a part of the Executive Branch of government. If the Legislature, in enacting T.C.A. § 4-5-223 attempted to vest judicial powers upon the Executive Branch, then the constitutional doctrine of separation of powers would be violated. It is axiomatic that the power and responsibility to determine the constitutionality of statutes rests with the Judicial Department of government. See *LaFever v. Ware*, 211 Tenn. 393, 365 S.W.2d 44, 47 (1963); *Williams v. Carr*, 218 Tenn. 564, 404 S.W.2d 522 (1966); *Peay v. Nolin*, 157 Tenn. 222, 7 S.W.2d 815, 816 (1928).

Article II, Section 1, of the Tennessee Constitution divides the government of this state into three distinct departments: Legislative, Executive and Judicial. Article II, Section 2 provides:

> "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed and permitted."

If possible, courts will construe a statute in a manner which will uphold its constitutionality and will not construe it in a manner which would defeat it. *Marion County Bd. of Com'rs. v. Marion County Election Commission*, 594 S.W.2d 681 (Tenn. 1980); *Mitchell v. Mitchell*, 594 S.W.2d 699 (Tenn. 1980); *State v. Netto*, 486 S.W.2d 729 (Tenn. 1972); *Ellenburg v. State*, 384 S.W.2d 29 (Tenn. 1964). We hold that the word "validity" as

used in T.C.A. § 4-5-223 was not intended to bestow upon administrative agencies the power to determine constitutionality of State statutes.

The other issue presented by the Metropolitan Government was whether it followed the statutory requirements of exhausting its administrative remedies in pursuing this constitutional issue. Apparently, this issue was precipitated by T.C.A. § 4-5-224 of the Uniform Administrative Procedures Act which allows a suit for declaratory judgments to determine "legal validity or applicability of a statute." T.C.A. § 4-5-224(b) provides that a declaratory judgment under the Administrative Procedures Act cannot be pursued in Chancery Court to determine the validity of a statute "unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order." As above stated in the quote from *Draughon v. Plummer, supra*, trial courts have the jurisdiction to hear and decide constitutional questions. To require parties to present constitutional questions to administrative agencies who do not have the authority to decide them would be an exercise in futility. We hold that it is not necessary or appropriate to exhaust administrative remedies pursuant to Sections 4-5-223 and 4-5-224 of the Uniform Administrative Procedures Act before resorting to the trial courts of this State for adjudication of the constitutionality of a State statute.

The judgment below is affirmed. Costs are adjudged against appellants, Metropolitan Government of Nashville and Davidson County and the State Board of Equalization.

/s/ LLOYD TATUM, SPECIAL JUDGE

CONCUR:

BEN. H. CANTRELL, JUDGE
SAMUEL L. LEWIS, JUDGE